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In The
Supreme Court of the United States

RALPH TAYLOR,
Petitioner,
v.
CITY OF FALMOUTH,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED FOR REVIEW

Petitioner Ralph Taylor is one of few African-Americans who reside in Falmouth, Kentucky. Over the course of four years, Mr. Taylor repeatedly addressed the all-white city council concerning the disposition of his son's vehicle that had been towed and lost by city officials. While lawfully speaking at a meeting in August 2002, a city councilman interrupted Mr. Taylor and said he was sick of him addressing council about the issue. The councilman then called Mr. Taylor a "big black bastard" and demanded he "step outside" to fight. Several other council members laughed. When Mr. Taylor attempted to leave the meeting, Falmouth police detained him for at least thirty minutes. The Sixth Circuit below held that the racial slur, threat of physical violence and police detention to which Mr. Taylor was subjected were "de minimis harm" that did not constitute actionable First Amendment retaliation or a violation of the Equal Protection Clause.

Petitioner respectfully requests the Court review the following questions:

I. What is the proper standard for determining whether retaliatory verbal conduct toward an ordinary citizen is actionable under § 1983; is it either: (1) that it is not actionable under any

circumstances as a matter of law simply because it is verbal in nature (as held by the Sixth Circuit below and the Fifth and Ninth Circuits); (2) it is actionable only if it includes a threat, coercion or intimidation (as held by the Fourth Circuit); or (3) it is actionable where it would deter a reasonable person from engaging in protected activity (as held by the Second Circuit and as recently set forth by this Court in the employment context in *Burlington*)?

II. What is the proper evidentiary threshold for an ordinary citizen to establish a violation of the Equal Protection Clause where a government official subjects him to a racial slur and harassment; is it either: (1) proof that the conduct had a discriminatory effect and a discriminatory purpose (as held by this Court in *Arlington Heights*); or (2) proof of a racial slur plus harassment and/or a distinct violation of rights (as held by the Sixth Circuit below and the Third, Fifth and D.C. Circuits); and if the second threshold is to apply, what is the standard for defining "harassment"?

PARTIES TO PROCEEDING

Ralph Taylor is an African-American citizen of the United States and a resident of City of Falmouth located in the Commonwealth of Kentucky.

The City of Falmouth is a municipal corporation within the Commonwealth of Kentucky. Defendants Donald England is a duly elected member of the Falmouth City Council.

PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Supreme Court, Ralph Taylor respectfully prays that a Writ of Certiorari issue to review to the decisions entered by the United States Court of Appeals for the Sixth Circuit, *Ralph Taylor, et al. v. City of Falmouth, et al.*, 05-5585, affirming the decision of the United States District Court for the Eastern District of Kentucky, *Ralph Taylor, et al. v. City of Falmouth, et al.*, 2:03-cv-00142-DLB.

OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit's decision is dated July 10, 2006. (Apx. C-1). The decision of the court of appeals denying the petition for rehearing and suggestion of rehearing *en banc* is dated

October 27, 2006. (Apx. A-1). Both decisions affirmed the district court's opinion and order dated March 9, 2005. (Apx. D-1).

BASIS OF JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution Amendment I

The First Amendment to the United States Constitution provides in relevant part that, "Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

United States Constitution Amendment XIV

The Fourteenth Amendment to the United States Constitution at Section 1 provides that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of the United States...nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured * * *."

STATEMENT OF THE CASE

1. Ralph Taylor is an African-American resident of the City of Falmouth, Kentucky. According to the United States Census Bureau, the population of Falmouth is 2,058 residents; 39 of those residents are African-American.

2. In August 1998, Falmouth police officers issued a court citation in connection with an inoperable vehicle belonging to Mr. Taylor's son, Shawn, who at that time was serving in the United States Navy. Police towed the vehicle from Mr. Taylor's property. In October 1998, a state court ultimately dismissed the citation. Mr. Taylor sought the return of his son's vehicle and was instructed to contact city officials. After speaking with the mayor and

then police chief about the matter, Mr. Taylor was referred to the Falmouth City Council for assistance.

3. Over the next several years, Mr. Taylor tried in vain to recover his son's truck from the City, by among other things, complaining to the city council. In February 2002, the city council learned that garage to which police had towed the vehicle was no longer in business and that the vehicle was lost.

4. Mr. Taylor returned to city council on August 6, 2002, to again convey his complaint about the City's continued refusal to return his son's truck or reimburse him for the loss. He was officially recognized to address the council during the portion of the meeting routinely designated for citizen comments. He again respectfully requested to return of the truck. In the presence of the entire Council and other citizens in attendance, Councilmember Donald England responded: "I'm tired of you coming down here asking about that damn Blazer." In a threatening manner, England then yelled at Plaintiff "you big black bastard," at which point Mr. Taylor heard laughter from other council members. In an intimidating manner, England then told Mr. Taylor to "step outside" to fight. England walked outside, accompanied by an armed officer, for the apparent purpose

of making good on his threat. Mr. Taylor felt his "life was threatened that night." After the council's rejection of Mr. Taylor's complaints, Mr. Taylor left the municipal building to go home. He was met by two armed city police officers who detained him for approximately 30 to 45 minutes.

5. In September 2002, Mr. Taylor was again listed on the agenda of the city council meeting. Mindful of the racial slur, threat of violence and police detention to which he had been subjected the previous month, Mr. Taylor choose not to attend that meeting out of fear of additional retaliation.

6. In July 2003, Ralph Taylor and Shawn Taylor filed a federal civil rights lawsuit against the City of Falmouth, several police officials and the city council arising out of the disposition of Shawn Taylor's vehicle and the defendants' actions toward Ralph Taylor during the August 2002 city council meeting. The district court granted summary judgment in favor of Shawn Taylor on his procedural due process claims, but granted summary judgment against Ralph Taylor on his claims under § 1983 for violations of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. (Apx. D-31).

7. Mr. Taylor filed a timely appeal to the United States Court of Appeals for the Sixth Circuit, which affirmed the district court's decision on July 10, 2006. (Apx. C-2). Specifically, the appeals court held that the racial slur, threat of physical violence and police detention to which Mr. Taylor was subjected were insufficient as a matter of law to constitute an adverse action under § 1983 because even collectively, they constituted verbal conduct rather than physical/tangible conduct. (Apx. C-10-11). Mr. Taylor's petition for rehearing *en banc* (Apx. B-1) was denied on October 27, 2006. (Apx. A-1-2).

8. The first question presented addresses the three-way conflict among lower courts regarding the definition of "adverse action" in § 1983 claims. In the decision below, the Sixth Circuit held as a matter of law that verbal conduct, even racial slurs and threats of physical violence, is insufficient as a matter of law to constitute actionable retaliation under § 1983. The Sixth Circuit's absolute exclusion of verbal conduct (also applied by the Fifth and Ninth Circuits) directly conflicts with the broader approach adopted by the Fourth Circuit (retaliatory verbal conduct actionable where it includes a threat, intimidation or coercion) and the standard adopted by the Second Circuit which adopts this Court's Title VII decision in

Burlington defining actionable retaliation as any conduct that would deter a reasonable person from engaging in protected activity. This Court's review is necessary to resolve the conflict between the circuit courts and to ensure that ordinary citizens like Mr. Taylor are not chilled from engaging in free speech by the retaliatory conduct of government officials.

9. The second question presented seeks this Court's clarification of the proper standard for an ordinary citizen to establish a violation of the Equal Protection Clause where a government official subjects him to a racial slur and harassment. While this Court has suggested that "ordinary equal protection standards" set forth in *Arlington Heights* should apply, requiring proof that the conduct had a discriminatory effect and a discriminatory purpose, at least four circuit courts, including the Sixth Circuit below, have applied a heightened evidentiary threshold requiring proof of a racial slur plus harassment and/or a distinct violation of another right. The Court's review of this issue is warranted to resolve these conflicting views and promote the overriding objective of the Equal Protection Clause: to prohibit unequal treatment of citizens on the basis of race. Even if the Court is to adopt the Sixth Circuit's heightened

standard, the Court's review is necessary to define what conduct constitutes sufficient "harassment."

REASONS SUPPORTING ALLOWANCE OF THE WRIT

I. FIRST AMENDMENT RETALIATION

A. Review should be granted to resolve the three-way conflict among circuit courts on whether and when verbal conduct can constitute actionable retaliation under § 1983.

The First Amendment prohibits government officials from subjecting an individual to retaliatory actions for exercising his right to free speech. *Hartman v. Moore*, 126 S.Ct. 1695, 1701 (2006). While the Court has addressed First Amendment retaliation in the context of public employment (e.g., *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006); *Connick v. Meyers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ. of Twp. High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968)) and § 1983 retaliation in the most constitutionally fundamental context, i.e., that of an ordinary citizen directly participating in the democratic process as presented in the case below.

The circuit courts generally agree that a claim for First Amendment retaliation under § 1983 requires a plaintiff to establish: (1) that he engaged in a constitutionally-protected activity; (2) that he was subjected to an adverse action that affected the protected activity; and (3) that a causal connection exists between the retaliatory action and the protected activity. *See Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005); *citing Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 499 (4th Cir. 2005); *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002).[1] However, the circuit courts are divided on the application of the second element in circumstances where a plaintiff alleges retaliation the form of verbal conduct. Three divergent approaches have emerged from the circuit courts on the issue of whether and when retaliatory verbal conduct is actionable under § 1983.

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[1] *See also Powell v. Alexander*, 391 F.3d 1 (1st Cir. 2004); Dawes *v. Walker*, 239 F.3d 489, 491 (2d Cir. 2001), overruled on other grounds by *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992 (2002); *Thomas v. Independence Twp.*, 463 F.3d 285 (3d Cir. 2006); *Thaddeus X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999); *Massey v. Johnson*, 457 U.S. F.3d 711 (7th Cir. 2006); *Carroll v. Pfeffer*, 262 F.3d 847, 850 (8th Cir. 2001); *Mendicino Environmental Ctr. v. Mendicino Cty.*, 192 F.3d 1283 (9th Cir. 1999); *Smith v. Plati*, 258 F.3d 1167, 1176 (10th Cir. 2001), and *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 585 (D.C. Cir. 2002).

The first approach adopted by the Sixth Circuit in the decision below, as well as by the Fifth and Ninth Circuits, holds that retaliatory verbal conduct is insufficient as a matter of law to constitute actionable retaliation under § 1983. (Apx. C-13); *citing Bender v. Brumley*, 1 F.3d 271 n4 (5th Cir. 1993)("[m]ere allegations of verbal abuse do not present claims under § 1983"); *citing Coyle v. Hughs,* 436 F.Supp. 591, 593 (W.D. Okla. 1977); *Gilbrook v. Cut of Westminster,* 177 F.3d 839 at n10 (9th Cir. 1999) *citing Nunez v. City of Los Angeles,* 147 F.3d 867, 875 (9th Cir. 1998)("proposition that words alone cannot form the basis of a claim of retaliation * * * is a correct statement of the law"). Under this view, a plaintiff must prove he was subjected to retaliatory conduct that was: (1) tangible/ physical; and (2) was of such a magnitude that it would deter a reasonable person from engaging in the protected activity. (Apx. C-12-13).

The second approach, employed by the Fourth Circuit, requires that to be actionable under § 1983, retaliatory verbal conduct must be reasonably perceived as a threat, coercion or intimidation. *Suarez Corp. Ind. v. McGraw,* 202 F.3d 676, 687 (4th Cir. 2002). As the Fourth Circuit explained, the requirement "recognizes that a balance must be struck between the citizen's right to

exercise his First Amendment rights, as well as [a government official's] duty to the public to speak out about matters of public concern." *Id.*, at 688, fn13, *citing Penthouse Int'l Ltd. v. Meese*, 939 F.2d 1011, 1015 (D.C. Cir. 1991). According to the Fourth Circuit, in order to meet the second element of retaliation, a plaintiff must demonstrate that the verbal retaliatory conduct to which he was subjected was: (1) threatening, coercive or intimidating; and (2) would deter a reasonable person from engaging in the protected activity. *Suarez*, 202 F.3d at 687.

The third view, recently articulated by the Second Circuit, draws no distinction between retaliatory conduct that is verbal and contact which is tangible/physical. *Zelnik v. Fashion Institute of Technology*, 464 F.3d 217, 227 (2d Cir. 2006). Instead, the Second Circuit, adopting the language of *Burlington Northern and Santa Fe Ry. Co. v. White,* 126 S.Ct. 2405, 2415 (2006), extends this Court's definition of "actionable retaliation" from the Title VII employment context to the § 1983 retaliation context. Under this view, actionable retaliation is any conduct "that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights." *Id.*; citing *Dawes*, 239 F.3d at 493. This objective, context-based standard requires a plaintiff to show only that the

retaliatory verbal conduct "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington*, 126 S.Ct. at 2415 (internal citations omitted).[2]

Decisions since *Burlington* issued by the Sixth Circuit in the case below and by the Fourth Circuit indicate that *Burlington* has not eliminated the three-way split between the circuit courts as to whether and when verbal conduct may support a claim for First Amendment retaliation. Despite a relatively clear and detailed directive from this Court regarding the proper standard for defining actionable retaliation in a Title VII context, both the Sixth and Fourth Circuit have effectively ignored *Burlington* in a

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[2] In *Burlington,* the Court held that the scope of retaliation protection should be broader than Title VII's substantive discrimination protection to effectuate the underlying purpose, holding "'a limited construction would fail to fully achieve the anti-retaliation provision's primary purpose,' namely, "[m]aintaining unfettered access to statutory remedial mechanisms." *Burlington,* 126 S.Ct. at 2412; *citing Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). Instead, the Court stressed the need for a "standard in general terms because the significance of any given act of retaliation will often depend on the particular circumstances. Context matters." *Burlington*, 126 S.Ct. at 2415. The focus must be on the materiality of the retaliatory action as viewed from the perspective of "a reasonable person in the plaintiff's position." *Id.* at 2416. "[T]his standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade" protected activity. *Id.*

§ 1983 context.[3] Although this Court specifically indicated that its holding in *Burlington* was not limited to a Title VII context, *Id.*, at 2414; *citing Hishon v. King & Spalding*, 467 U.S. 68, 76 n8 (1984)(examining National Labor Relations Act),[4] post-*Burlington* decisions issued by the Sixth and Fourth Circuits establish that its guidance is not enough to remedy the split among the circuit courts regarding the scope of retaliation protection under § 1983.

In the decisions below, issued subsequent to *Burlington,* the issue of whether retaliatory verbal conduct was actionable under § 1983 was a question of first impression before the Sixth Circuit. (Apx. C-11). Petitioner expressly argued to the Sixth Circuit in his Petition for Rehearing (after *Burlington* was announced) that the Court had emphasized that anti-retaliation protection must be interpreted and applied broadly to effect

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[3] The Sixth Circuit previously acknowledged in the § 1983 context that "[t]he term 'adverse action' is drawn from employment case law." *Thaddeus-X*, 175 F.3d at 396. Notwithstanding, the Sixth Circuit directly *ignored* binding employment case law in the case below by adopting a legal standard for determining actionable retaliation contrary to that set forth by this Court in *Burlington.*

[4] Circuit Courts have also extended *Burlington*'s definition of action-able retaliation outside of Title VII. *See Kessler v. Westchester Cty. Dept. of Social Svc.*, 461 F.3d 199, 205 (2d Cir. 2006)(ADEA); *Carmona-Rivera v. Puerto Rico*, 464 F.3d 14, 20 (1st Cir. 2006)(ADA); *Csismann v. Sadalla*, Slip Op., 2006 WL 3611729 at *4 (4th Cir.2006) (FMLA and ERISA); and *Zelnik*, 464 F.3d at 227 (§ 1983).

the purposes underlying the protected activity. The Sixth Circuit, however, did not so much as acknowledge *Burlington* in its decisions in the case below. Instead, it effectively announced that the appeals court will continue to adhere to its view absolutely excluding retaliatory verbal conduct as a form of actionable retaliation notwithstanding *Burlington*. (Apx. A-1-2). Similarly, the Fourth Circuit continues to apply its view that verbal conduct is actionable only where it contains a threat, coercion or intimidation. *See Blankenship v. Manchin*, 471 F.3d 523 (4th Cir. 2006)("because the alleged retaliation is in the nature of speech, we must first determine whether [the government official's] remarks were 'threatening, coercive, or intimidating so as to intimate that punishment, sanction, or adverse regulatory action will imminently follow.'"); *citing Suarez*, 202 F.3d at 689.

This Court's review is necessary to resolve the three-way split among the circuit courts that remains even post-*Burlington*. In the absence of clarification from the Court, an individual's protection from retaliatory verbal abuse, even threats of harm as in this case, will continue to hinge upon geography. In the Second and Fourth Circuits, the racial slur, the threat of physical violence and police detention to which Mr. Taylor was subjected would

constitute actionable retaliation; in the Fifth, Sixth and Ninth Circuits, however, that very same conduct is insufficient as a matter of law to support a claim under § 1983. Because citizens are entitled to know how much protection they will be afforded for First Amendment activity, this petition should be granted.

B. Review should be granted because free speech is chilled where government officials are permitted to retaliate against "ordinary citizens" for engaging in activity protected by the First Amendment.

1. An "ordinary citizen" should not have to endure racial slurs, threats of violence and police detention as a result of exercising his First Amendment rights.

Although the Sixth Circuit posited the question of whether the retaliatory conduct to which Mr. Taylor was subjected "would deter a reasonable African-American citizen from continuing to speak out at City Council meetings" (Apx. C-10), it ultimately dodged the question. Instead, the appeals court held that neither the egregiousness of the conduct nor its objective impact on the exercise of free speech was of Constitutional dimension

simply because the conduct was verbal in nature. (Apx. C-13).

This narrow view ignores the underlying objective for protecting a citizen's exercise of free speech from government retaliation: "[t]he reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right." *Crawford-El,* 118 S.Ct. at 1592 n10 (internal citations omitted). If government is permitted to retaliate against a person because of his constitutionally protected speech, "[t]his would allow the government to 'produce a result which [it] could not command directly.'" *Perry v. Sniderman*, 408 U.S. 593, 597 (1972); *citing Speiser v. Randall*, 357 U.S. 513, 526 (1958). Instead of denying the citizen the right to engage in First Amendment activities, the government simply penalizes the citizens for exercising that right. *See Hines v. Gomez,* 108 F.3d 265, 269 (9th Cir. 1997), *cert. denied* 524 U.S. 936 (1998). Although the mode of retaliation is different than a direct prohibition of Free Speech, its effect is the same. Retaliation impermissibly interferes with a First Amendment right. *Perry*, 408 U.S. at 597.

In the absence of this Court's review, the view espoused Sixth Circuit below as well as by the Fifth and Ninth Circuits permits government officials such as the

Defendants in the case below to chill the speech of "ordinary citizens" – most especially minorities who presumably do not wish and certainly should not be expected to be subjected to racial slurs, threats of violence and police detention as a consequence of exercising their First Amendment rights. (Apx. C-13).

2. The Court should adopt the Second Circuit's view because an ordinary citizen deserves at least as much protection from retaliation under § 1983 as public employees and prisoners.

Cases examining § 1983 retaliation claims in public employment and prisoner contexts reveal that speech by an "ordinary citizen" must be afforded the broadest scope of protection from retaliation. "Prisoners may be required to tolerate more than public employees, who may be required to tolerate more than average citizens, before an action taken against them is considered adverse." *Thaddeus-X v. Blatter,* 175 F.3d 378, 398; *see also Bennett v. Hendrix,* 423 F.3d 1247, 1253 n6 ("It follows that a private citizen, not subject to the expected deprivations of prison life, deserves at least as much protection from retaliation"); *citing Mitchell v. Horn,* 318 F.3d 523, 530 (3d Cir. 2003). In the public employment context, protection from

retaliation under § 1983 is triggered only where the employee is acting as a "private citizen." *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1953-1954 (2006)("[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively"); *citing Connick v. Myers*, 461 U.S. 138, 147.

The logic underlying the differing standards of protection for prisoners and public employees as compared to private citizens is clear: in the first two contexts, the government has a compelling interest in limiting speech. *See Garcetti*, 126 S.Ct. at 1953 ("[t]he question becomes whether the [government] had an adequate justification for treating the [plaintiff] differently from any other member of the general public"); *citing Pickering v. Bd. of Ed. of Twp. High School Dist. 205 Will Cty.*, 391 U.S. 563, 568 (1968). In a public employment context, limitations on First Amendment activities are justified by a government employer's need to maintain a degree of control over its employees. *Garcetti*, 126 S.Ct. at 1953 ("[w]ithout a significant degree of control over its employees' words and actions, a government employer would have little chance to provide public services efficiently"); *citing Connick*, 461 U.S. at 143. In a prison context, restrictions on speech are

permitted to promote "legitimate penological interests" such as security. *Pell v. Procunier*, 417 U.S. 817, 822 (1974). No equivalent governmental interest justifies narrowing an ordinary citizen's protections against retaliation for engaging in First Amendment activity.

Under the Sixth Circuit's view, however, an ordinary citizen is given the least protection from First Amendment retaliation as compared to a public employee or even a prisoner. The absolute exclusion of retaliatory verbal conduct without consideration of its context or its impact on the exercise of free speech ignores this Court's holding in *Burlington*. *Burlington*, 126 S.Ct: at 1215 ("[i]n our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have 'dissuaded a reasonable worker from [engaging in protected activity.]'")(internal citations omitted). Without this Court's review, ordinary citizens like Mr. Taylor who are subjected to egregious retaliatory conduct will have no recourse under § 1983 in at least three federal circuit court jurisdictions. Their choices will be simple: put up with the retaliatory egregious conduct or shut up – or move into a different federal circuit. None are Constitutionally acceptable.

II. EQUAL PROTECTION VIOLATION

A. Review is warranted because circuit courts have imposed an undefined heightened evidentiary harassment threshold upon individuals subjected to racially hostile conduct from government.

1. The heightened evidentiary harassment threshold effectively permits government to treat citizens unequally on the basis of race with impunity depending on the degree on harm.

This Court has held that an individual plaintiff who contends that the government subjected him to unequal treatment on the basis of his race must establish the "ordinary equal protection standards" set forth in *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 264-265 (1977). *Arlington Heights* requires a plaintiff to show that the challenged government action: (1) had a discriminatory effect; and (2) was undertaken with a discriminatory purpose or intent. *Id; see also U.S. v. Armstrong*, 517 U.S. 456, 466 (1996); *citing Wayte v. U.S.*, 470 U.S. 598, 608 (1985). This standard is consistent with the general proposition set forth in *Grutter v Bollinger*, 539

U.S. 306, 327 (2003): that the government violates a person's right to equal protection under the law where it treats him unequally because of his race. *Id.*; *quoting Adarand v. Pena,* 515 U.S. 200, 229-230 (1995).

Notwithstanding *Arlington Heights*, the circuit courts have uniformly imposed a far more stringent evidentiary standard upon a plaintiff seeking to establish an Equal Protection violation by a government official's use of a racial slur in the course of taking some adverse action against him. This heightened standard, adopted by the Sixth Circuit as well as the Third, Fifth and District of Columbia Circuits, requires a plaintiff to establish: (1) use of a racial slur by a government official; plus (2) some other form of harassment and/or violation of rights. (Apx. C-14); see also *Salley v. PA Department of Corrections*, 181 Fed. Appx. 258, 266 (3d Cir. 2006) ("the use of racial slurs without accompanying harassment or deprivation of a right is not a violation of equal protection."); *Williams v. Bramer,* 180 F.3d 699, 706 (5th Cir.1999) ("racial epithets coupled with harassment are sufficient to support a cause of action under the Equal Protection Clause.");[5] and *King v. City of*

[5] Interestingly, the Fifth Circuit declined to decide the "thorny issue" of whether racial epithets alone can be "sufficient to assert a cause of action under the Fourteenth Amendment." *Williams v. Bramer,* 180 F. 3d at 706. "Query whether the use of such language, rancid and

Eastpointe, 86 Fed.Appx. 790, 814 (6th Cir. 2003) ("[a]n officer's use of a racial epithet, without harassment or some other conduct that deprives the victim of established rights, does not amount to an equal protection violation"); *Keyes v. City of Albany,* 594 F.Supp. 1147 (D.C.N.Y. 1984)(African American subjected to racial slur during beating by white police officers failed to state an equal protection claim because "allegations did not rise to the level of a constitutional deprivation in any event").

The fundamental difference between *Arlington Heights* and the circuit courts' heightened evidentiary threshold is that the circuit courts standard conditions the applicability of the Equal Protection Clause on the degree of harm caused by the government conduct, regardless of its discriminatory effect or intent. (Apx. C-14); *see also Williams v. Bramer,* 180 F.3d 699, 706 ("[t]he question in the equal protection context, however, is not just whether the conduct is racially motivated but also whether that action deprives a person of 'equal protection of the laws" * * * Where the conduct at issue consists solely of speech, there is no equal protection violation"). This heightened

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denigrating as it certainly is, standing alone, amounts to the kind of violation contemplated by the Fourteenth Amendment Equal Protection Clause." *Id.*

evidentiary threshold improperly conflates the harm caused by racial discrimination perpetrated by government, which in and of itself is actionable under the Equal Protection Clause, with the distinct injury caused by the unequal treatment, which in isolation may not be actionable under the Equal Protection clause. The distinction is crucial: the fact that a government treats persons unequally does not, in and of itself, violate the Equal Protection Clause. The Equal Protection Clause is triggered only when such unequal treatment is motivated by an impermissible consideration such as race, gender or religion. *Adarand*, 515 U.S. at 229-230; *see also Richmond v. J.A. Croson Co.*, 408 U.S. 469, 493 (1989)(recognizing "stigmatic harm" of racial classifications). The guiding standard must be whether the government's adverse treatment was motivated by a discriminatory intent or purpose. *Arlington Heights*, 429 U.S. at 264-265. Under the Sixth Circuit's treatment, however, demonstrating unequal treatment because of race is not enough.

By way of example, the mere fact that Defendants may have treated Mr. Taylor less favorably than other individuals addressing the city council during a meeting is not, in and of itself, inconsistent with the Equal Protection Clause. What triggers the Equal Protection clause here is

Defendants' motivation for treating Mr. Taylor less favorably, which as Defendants expressly stated, was because in their view Mr. Taylor was "a big black bastard." [6] Simply put, Mr. Taylor offered evidence of government action that had a discriminatory effect and was undertaken for a discriminatory purpose. Under *Arlington Heights*, this evidence was more than sufficient to establish a Equal Protection violation. *See Arlington Heights,* 429 U.S. at 264-265. Yet under the Sixth Circuit's heightened evidentiary threshold, "the totality of the actions alleged by Taylor did not transform the outburst and following separation into a deprivation of constitutional rights." (Apx. C-15). In other words, Mr. Taylor's equal protection rights may have been violated, but they were not violated enough.

"A free people whose institutions are founded upon the doctrine of equality should tolerate **no retreat** from the principle that government may treat people differently because their race only for the most compelling reasons."

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[6] It is important to emphasize that the racial harassment in this case was not occasioned by the unsanctioned conduct of subordinates. Rather, the racially hostile conduct was that of the governing body itself. Because it is the City's legislative body itself engaging in the racially intimidating conduct, Plaintiff has no recourse to any higher authority to whom he may address his complaints. *See Smith v. Thornburg* 136 F.3d 1070, 1089-90 (6th Cir.1998) (Clay, J., dissenting) (asserting that alleged racial slurs standing alone form the basis for an Equal Protection claim).

Adarand, 515 U.S. at 227; *quoting Hirabavashi v. U.S.*, 320 U.S. 81, 100 (1943). The Sixth Circuit's heightened evidentiary standard, adopted by the Third, Fifth, Sixth and D.C. Circuits, is a retreat, effectively holding that the Equal Protection Clause will tolerate at least some level of unequal treatment of citizens on the basis of race. (Apx. C-15). Any Equal Protection standard which, as a matter of law, permits a government official to subject an ordinary citizen seeking redress of a grievance at a public meeting to racial slurs, threats of physical violence and police detention is inconsistent with the objectives of the Equal Protection Clause and warrants the review of this Court.

B. Even if the Court finds that a heightened evidentiary standard is proper, review is necessary to articulate a clear, consistent threshold of what conduct constitutes "harassment" sufficient to support a claim under § 1983.

In the event that the Sixth Circuit's heightened evidentiary standard can somehow be reconciled with *Arlington Heights* and the underlying objectives of the Equal Protection Clause, this Court's review is nonetheless necessary to provide a clear standard for precisely what

type of "harassment" is sufficient to meet the "racial slur plus harassment" formula. (Apx. C-15). In the case below, Defendants' use of a racial slur was conceded. If the additional threat of violence and police detention to which Mr. Taylor was also subjected does not as matter of law to constitute "harassment," this Court must articulate what conduct will.

While the Sixth Circuit's decision below summarily concluded that the racial slur and harassment to which Mr. Taylor was subjected was Constitutionally insignificant, *Id.*, it provided no indication of what type of harm would support a §1983 action under the Equal Protection Clause. Instead, it discussed two cases where a government official used a racial slur but did not engage in any additional conduct that could be considered "harassment." (Apx. C-14; *citing Williams v. Bramer*, 180 F.3d 699, 708 (5th Cir. 1999)(police officer who did not participate in use of force addressed African American as "boy" and "nigger"); *King v. City of Eastpointe*, 86 Fed. Appx. 790, 814 (6th Cir. 2003)(police officer called 13-year-old African American "boy"). What is clear from the Sixth Circuit's decision below is that "harassment" must consist of something more serious than the use of a racial epithet, threat of physical violence, refusal to address a citizen's lawful grievance and

the humiliating unlawful detention by an armed city police officer for more than 30 minutes that Mr. Taylor experienced. This holding sets an evidentiary standard for demonstrating an Equal Protection claim that surely was not contemplated by this Court in *Arlington Heights*.[7] Yet it is clearly the standard that is gaining favor among the Circuits.

The effect of the decision of the Sixth Circuit and applied in sister Circuits is to add an evidentiary layer that requires a victim of discrimination to demonstrate a level of harassment that meets some yet undefined level of severity. This Court's review is warranted to define precisely how much unequal treatment on the basis of race is enough to support an action under the Equal Protection Clause under § 1983. In the absence of the Court's review, the circuit courts suggest quite a bit.

CONCLUSION

The only thing more troubling than Defendants' overt display of racially hostility toward Mr. Taylor in a

[7] It is important to emphasize that the racial harassment in this case was not occasioned by the unsanctioned conduct of subordinates. Rather, the racially hostile conduct was that of the governing body itself. Because it is the City's legislative body itself engaging in the racially intimidating conduct, Plaintiff has no recourse to any higher authority to whom he may address his complaints. And see, *Smith v. Thornburg* 136 F.3d 1070, 1089-90 (6th Cir.1998) (Clay, J., dissenting) (asserting that alleged racial slurs standing alone form the basis for an Equal Protection claim).

public meeting is the Sixth Circuit's implicit endorsement of that conduct. The Court's review of the questions presented is appropriate for two reasons. First, it is necessary to resolve the disarray among the circuit courts, indeed even between the circuit courts and this Court, on the proper legal standards for determining actionable retaliation and Equal Protection violations under § 1983. Second, this Court's review is needed to address the troubling gap between a citizen's Constitutional rights and his ability to seek redress when he is retaliated against for exercising those rights or discriminated against on the basis of race. The Sixth Circuit's decision below allows a government official to subject an ordinary citizen to racial slurs, threats of physical violence and police detention in retaliation for First Amendment activity with impunity.

In the absence of this Court's intervention, ordinary citizens, particularly racial minorities, wishing to exercise their Constitutional rights will be faced with the choice between tolerating retaliatory, racially-hostile conduct and remaining silent. Because neither option is Constitutionally acceptable, Petitioner respectfully requests his Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

SIXTH CIRCUIT COURT OF APPEALS:

Order Denying Rehearing,
filed 10/27/06 ..... A1 - A2

Petition for Rehearing,
filed 07/24/06 ..... B1 - B20

Opinion,
filed 07/10/06 ..... C1 - C16

EASTERN DISTRICT OF KENTUCKY:

Opinion and Order,
filed 03/09/05 ..... D1 - D68

No. 05-5585

UNITED STATE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct. 27, 2006

Leonard Green,
Clerk

RALPH TAYLOR,

Plaintiff-Appellant,

v.

CITY OF FALMOUTH, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: BATCHELDER and GRIFFIN, Circuit Judges; and ZATKOFF,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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*Hon. Lawrence P. Zatkoff, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

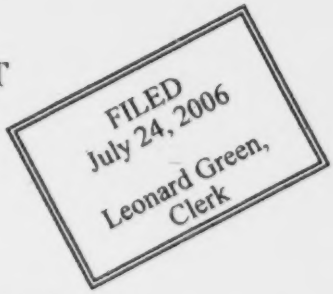
/s/ Leonard Green

Leonard Green, Clerk

CASE NO: 05-5585
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RALPH TAYLOR

PLAINTIFF-APPELLANT



vs.

CITY OF FALMOUTH, ET AL.

DEFENDANTS-APPELLEES

On Appeal from the United States District Court
Eastern District of Kentucky, Covington Division

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

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I. INTRODUCTION

Appellant Ralph Taylor, pursuant to FRAP 35 and 6 Cir. R. 35, petitions this Court for a Rehearing with a Suggestion of En Banc Review of his appeal of the Motion for Summary Judgment granted to Defendants below. The appeal, affirming the district court's granting of summary judgment in favor of Defendants as to all claims asserted by Ralph Taylor, was decided on July 10, 2006.

A. MANDATORY STATEMENT OF REASONS FOR GRANTING REHEARING AND REHEARING *EN BANC*.

As grounds for his Petition, Appellant states as follows:

1. The Panel's decision finding that Appellant was not deprived of his constitutionally protected First Amendment right to speech and to petition government conflicts with Supreme Court's decisions in *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) and *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S.Ct. 2405 (2006), and with this Circuit's decision in *King v. City of Eastpointe*, 86 F. App'x 790 (6th Cir. 2003) (unpublished).

2. The Panel's decision that racial intimidation of Petitioner by a Council Member during an official meeting of City Council, where there is evidence of acquiescence by the other Council Members, did not violate Mr. Taylor's constitutional right to Equal Protection conflicts with *King v. City of Eastpointe*, 86 Fed.Appx. 790, 2003 WL 22976567 (6th Cir. 2003) (unpublished).

II. FACTS RELATED TO PETITION FOR REHEARING.

Plaintiff Ralph Taylor is an African-American citizen of the United States and a resident of Falmouth, Pendleton County, Kentucky. He was persistent in his efforts to petition the Falmouth City Council for the return of his son's truck that was unlawfully confiscated from his private property by the City.[1] After many unsuccessful

[1] The City refused to return the vehicle or compensate the Taylor family for the vehicle after the state district court dismissed the towing citation. The United States District Court granted summary judgment in favor of Shawn Taylor on this due process claim finding that the City violated Petitioner's rights to due process of law with respect to the confiscation. (Opinion and Order, R. 52, p. 43, APX. 71).

efforts, Mr. Taylor attended an August 6, 2002, Council meeting to again petition his local government to return the vehicle. Mr. Taylor was recognized to speak at the Council Meeting. Instead of addressing his complaints, Council Member Donald England yelled at Ralph Taylor in a violent and threatening manner, called him a "black bastard" and threatened physical violence. (D. England Depo. pp. 36-38,39,51, APX. 242, 243, 246). Mr. England concedes that he used the racial slur and further agrees that he instructed Mr. Taylor to step outside with the specific intent of fighting him. (D. England Depo., pp. 38, 51, APX. 243, 246). At the time this occurred, Mr. Taylor heard laughter coming from the Council table. (R. Taylor Depo., p. 99, APX. 231). Each member of Council concedes that he or she heard this racist outburst and did nothing intercede or otherwise protect Mr. Taylor's right to convey his grievance to the Council. By their laughter and failure to intercede or object to the racist conduct, each Council Member knowingly acquiesced in England's racially offensive actions. (D. England Depo., pp. 53-55, APX. 246, 247).

Defendant England left the council meeting, accompanied by an armed city police officer, for the purpose of carrying out his threat to fight Appellant. (D. England Depo., pp. 51-53, APX. 246). When Mr. Taylor left the meeting, he was prevented from going home and detained by police for 30 to 45 minutes. (R. Taylor Depo., p. 94, APX. 226).

Mr. Taylor filed this action claiming that the conduct of the City and its officials and employees violated his right to free speech and denied him equal protection of the laws. A Panel of this Court found the racially intimidating conduct of the City was essentially *de minimus* and that neither the First Amendment nor Equal Protection rights of Mr. Taylor were violated. (Panel Slip Opinion p. 6). Because the decision appears to conflict with a prior holdings of this Court and the Supreme Court, Appellant respectfully requests this Court to vacate the decision of the Panel and set this matter for rehearing *en banc*.

III. ARGUMENT

A. THE PANEL DECISION CONFLICTS WITH PREVAILING LAW IN THE CIRCUIT AND THE SUPREME COURT DECISION IN *Burlington Northern & Santa Fe Railway Co. v. White*, REQUIRING THAT A COURT CONDUCT A CONTEXTUAL ANALYSIS OF THE FACTS TO DETERMINE THE EXISTENCE OF THE ADVERSE ACTION NEEDED TO ESTABLISH AN ACT OF RETALIATION.

The record in this case is unequivocal that while attempting to press a matter of public concern at a public meeting before an all-white city council, an African-American citizen was called a "big black bastard" and invited by one of the council members to "step outside" "to fight". According to the Panel, in these circumstances, no "adverse action" occurred to trigger a constitutional violation for First Amendment retaliation because the councilperson's comments would not deter a reasonable African-American citizen from continuing to speak at the meeting. In the view of the Panel, to hold otherwise would "trivialize the First Amendment." In so holding, the decision elevates the playground aphorism that "sticks and stones may break my bones, but words will never hurt me" to the level of a constitutional principle.

In reaching its decision, the Panel effectively ignored the standard adopted by this Circuit that requires a court to specifically "tailor" the analysis of the adverse action found in a First Amendment retaliation case to the circumstances of the specific retaliation claimed. In this Circuit, the standard for evaluation of evidence of an adverse action "depend upon the context" of the alleged injury. (See e.g., *Thaddeus X v. Blatter*, 175 F.3d 378, 384 (6th Cir. 1999) (adverse action prong tailored to prison setting); *Mattox v. City of Forest Park*, 183 Fed. 3d 515 (6th Cir. 1999) (public official may need to be more thick-skinned than the ordinary citizen when speaking out on matters of public concern); *Mezibov v. Allen*, 411 F.3d 612 (6th Cir. 2005) (criminal defense attorney of ordinary firmness would not be deterred from filing motions on behalf of a client).

In all the foregoing cases, the analysis of the adverse action prong placed particular emphasis on the facts and circumstances surrounding the challenged actions. In *Thaddeus X*, the fact that the alleged retaliation occurred in a prison setting was essential to the Court's consideration of the issue. In *Mattox*, and in *Mezibov*, the Courts placed considerable emphasis on the relative

positions or status of the individuals alleging a violation of their constitutional rights. In the former instance, a public official's vulnerability to verbal criticism was compared to that of private citizens; in the latter, the Court pointed out that the professional role of a criminal defense attorney necessarily requires a thick skin. In all of these cases the Court hinged its decision on the facts and circumstances unique to the case before it.

The Panel, however, made no effort to discuss, much less meaningfully analyze, whether the "offensive remarks" hurled at Mr. Taylor were sufficient to deter another African-American citizen from continuing to speak at any subsequent meetings. The Panel acknowledged no more than that Mr. Taylor is an African-American citizen and that remarks leveled at him were offensive. Nowhere in the opinion is there a discussion of why an African-American citizen should be expected to absorb such offensive remarks at a public meeting without being deterred from participating in the democratic process. Apparently, the Panel presumed *a priori* that a reasonable African-American citizen would not be chilled from addressing an all-white city council at a public meeting while knowing that to do so he or she risked exposure to

racial insults and threats of physical violence from members of Council. However naive this view seems on its face, the form of deductive reasoning applied by the Panel cannot be fairly reconciled with the prevailing law in this Circuit, requiring an analysis of the facts and circumstances of a particular case to determine whether verbal abuse is sufficient to constitute adverse action.

Likewise, the decision is inconsistent with the recent Supreme Court decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S.Ct. 2405 (2006). In *Burlington*, the Supreme Court addressed the scope of the anti-retaliation provisions in Title VII. The Supreme Court determined that the proper formulation for the anti-retaliation provision in Title VII requires a plaintiff to demonstrate that the challenged action "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (Slip Op. p. 14.) "The significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." (Slip Op. p. 14) [emphasis added].

Although *Burlington* concerned retaliation in the workplace, the decision makes clear that anti-retaliation protection should be interpreted and applied broadly to effect

the purposes that underlie it. (Slip Op. pp. 8-11.) For that reason, the Supreme Court clarified that it would not be anomalous to afford victims of retaliation broader protection than those for whom the anti-discrimination statute is intended primarily to protect. (Slip Op. p. 11.) According to the Supreme Court "[I]nterpreting the anti-retaliation provisions to provide broad protections for retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends." (Slip Op. p. 12.) Remarkably, neither of the cases from other circuits cited by the Panel to support the proposition that "[m]ere allegations of verbal abuse do not present actionable claims under § 1983", *Bender v. Brumley*, 1 F.3d 271 (5th Cir. 1993) and *Doe v. Gooden*, 214 F.3d 952 (8th Cir. 2000), is a First Amendment retaliation case. These cases, therefore, do not address the issue here; namely, whether verbal abuse would deter a reasonable African-American individual from speaking out on matters of public concern.

Burlington supports the position advanced in this appeal that the Panel failed to properly consider: whether a reasonable African-American citizen in the circumstances presented from this record would be chilled from addressing matters of public concern with local government

officials. The fact that the form of chill sought to be applied on the free exercise of speech was verbal abuse rather than a form of action is immaterial. What matters, as *Burlington* teaches, is whether a reasonable individual would be dissuaded by the verbal abuse from pursuing a complaint before the government.

In sum, the decision rests upon an artificial and substantively suspect categorical distinction between retaliatory acts stemming from verbal abuse and those from conduct. The Panel decision relies upon a presumption, rather than upon a contextual analysis of the record, as prevailing law in this Circuit requires. In addition, the decision is inconsistent with the analysis and broad interpretation of forms of retaliation set forth in *Burlington.* For either or both of these reasons *en banc* consideration of this appeal is warranted.

B. THE DECISION THAT A COUNCIL MEMBER'S USE OF A RACIAL SLUR IN CONJUNCTION WITH THE COUNCIL'S DENIAL OF PLAINTIFF'S COMPLAINT AND UNLAWFUL DETENTION DID NOT VIOLATE MR. TAYLOR'S RIGHT TO EQUAL PROTECTION IS CONTRARY TO THE RULE AFFIRMED BY THE SUPREME COURT IN *Grutter v. Bollinger*.

"Central both to the idea of the rule oflaw and to our own Constitution's guarantee of equal protection is the

principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996). That principle was not realized by the Panel's holding in this case. The rule enunciated by the Supreme Court regarding consideration of Fourteenth Amendment Equal Protection claims is simple and direct:

> "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection."

Grutter v. Bollinger, 539 U.S. 306, 327 (2003), quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229-230 (1995). The Panel's decision in this case conflicts with these fundamental principles. There is simply no apposite authority to support the Panel's decision that racially intimidating conduct consisting of the use of a racial slur accompanied by the rejection of Plaintiff's grievance, by physically threatening behavior and by the unlawful detention of Plaintiff does not violate Mr. Taylor's right to Equal Protection of the law. Mr. Taylor produced evidence, much of which was conceded, that City Council member

England engaged in racially hostile conduct that included the use of a racial slur in the course of rejecting Mr. Taylor's grievance to Council, accompanied by physically intimidating conduct and unlawful detention. Rather than measure the evidence produced by Mr. Taylor against the rule articulated in *Grutter*, the Panel concludes, "that the totality of the actions alleged by Taylor did not transform the outburst and following separation into a deprivation of constitutional rights."

Putting aside the Panel's characterization of Mr. Taylor's detention by an armed officer as a mere "separation," the Panel fails to follow established Equal Protection jurisprudence most recently articulated *in Grutter*, and cites no decision of this Court to support its Equal Protection holding. Rather, the Panel relies only on a short abstract of a concurring and dissenting opinion of Judge Moore, and Judge Moore's reliance on a Fifth Circuit case, without any substantive analysis of facts in this case, to reach this unprecedented result.

The Panel notes Judge Moore's statement in a concurring and dissenting opinion that "'use of a racial epithet by itself is not an actionable violation of the Equal Protection Clause.'" (Slip Opinion, p. 10, quoting *King v.*

City of Eastpointe, 86 F. App'x 790, 814 (6th Cir. 2003) (Moore, J., concurring in part and dissenting in part). The Panel concedes that use of the racial slur accompanied by "harassment" or other constitutional violation would meet the test enunciated by Judge Moore. Yet the Panel never does a substantive analysis of the facts under that standard, simply dismissing Plaintiff s evidence as not rising to the level of a constitutional violation. More important, the Panel fails to explain how the physical intimidation of Mr. Taylor, the denial of his grievance regarding his son's truck, and his unlawful detention by an armed officer, all of which accompanied the racial slur, fails to meet the rule reaffirmed by the Supreme Court in *Grutter*.[2]

The context of the events which are central to Appellant's Equal Protection claim is critical. Mr. Taylor

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[2] While the record does support an equal protection violation even under the District Court's analysis, there is a determinative, qualitative difference between the circumstances of the cases upon which Appellees and the District Court rely and the instant case. The racial harassment in this case was not occasioned by the unsanctioned conduct of subordinates. Rather, the racially hostile conduct was that of the ***governing body itself***. Because it is the City's legislative body itself engaging in the racially intimidating conduct, Plaintiff has no recourse to any higher authority to whom he may address his complaints.

had tried in vain since 1998 to recover his son's unlawfully confiscated truck from the City, by among other things, complaining on many occasions to the City Council itself. Mr. Taylor returned to City Council on August 6, 2002. He was officially recognized to address the Council, at which time he again respectfully requested the Council to return the truck. (Taylor Depo. pp. 84-91, APX. 216-223). Donald England responded with the following retort: "I'm tired of you coming down here asking about that damn Blazer." (Taylor Depo., p. 91, APX. 223). In a threatening manner, England then yelled at Plaintiff "you big black bastard." At the time this racist remark was made, Mr. Taylor heard "laughter at Council's table." (R. Taylor Depo., p. 99, APX. 231). In an intimidating manner, England then told Mr. Taylor to "step outside." The purpose of that directive was to fight Plaintiff. (D. England Depo., p. 38, APX. 243). Mr. England walked outside, accompanied by an armed officer, for the purpose of making good on his threat. (D. England Depo., p. 51, APX. 246). At this point, Mr. Taylor felt his safety was clearly threatened: "I felt my life was threatened that night and I felt I was setup for that, too..." (R. Taylor Depo., p. 96). After Council's racist rejection of Mr. Taylor's complaints, Mr. Taylor left the City building

and began to walk home. He was met by two officers who began pushing him back, stating that there would be no fighting. Plaintiff informed the officers that he just wanted to go home. Nevertheless, the officers detained Mr. Taylor ***without cause*** for approximately 30 to 45 minutes, preventing him from leaving the area and returning home. (R. Taylor Depo., p. 94, APX. 226).

Thus, Mr. Taylor has shown that the racial slur occurred in conjunction with harassment or deprivation "of other established rights." *King*, *supra*. This meets the Equal Protection threshold articulated by Judge Moore and accepted by the Panel as controlling. The holding in *King* confirms this. The Court there found that evidence of use of a racial slur (the term "boy") in conjunction with what the Court found to be a lawful stop was sufficient to deny summary judgment as to the Equal Protection claim and submit the claim to the jury. *Id.* 86 Fed. Appx. at 803.

Moreover, there is no doubt that Mr. Taylor has met the rule reaffirmed by the Supreme Court in *Grutter*, i.e., he has offered evidence that the "government [treated him] unequally because of his race." Under *Grutter* and decades of Equal Protection jurisprudence, Mr. Taylor "suffered an injury that falls squarely within the language and spirit of

the Constitution's guarantee of equal protection." *Id.*, *and see*, *Romer v. Evans*, 517 U.S. at 633; *Sweatt v. Painter*, 339 U.S. 629, 635 (1950). The effect of the Panel's holding is to raise the evidentiary threshold that must be met by an African-American if he or she is to succeed with an Equal Protection claim. Such a burden should be reviewed by the entire Court.

C. THE PANEL'S DECISION REGARDING MUNICIPAL LIABILITY IS CONTRARY TO PREVIOUS HOLDINGS REGARDING LIABILITY FOR KNOWING ACQUIESCENCE TO UNCONSTITUTIONAL CONDUCT.

After conceding that tacit approval of unconstitutional conduct is sufficient to hold a municipality liable for violating a citizen's rights, the Panel accepts the District Court's finding that no such liability exists here. The Panel did not conduct its own analysis of the facts underlying Ralph Taylor's claims, including the facts that Council, as a whole, had not:

1. addressed Mr. Taylor's claim for relief for the unlawful confiscation of his son's truck;

2. interceded on Mr. Taylor's behalf when he was called a racially derogatory name by a Council member and threatened with violence by that same Council member.

Furthermore, as Mr. Taylor testified, laughter emanated from the Council table following Donald England's offensive name-calling and threats. Mr. England, an elected member of City Council, is "a municipal policymaker" within the meaning of *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). As the Sixth Circuit holds, a municipality may be liable when a plaintiff show[s] that the official at least implicitly authorized, approved, or ***knowingly acquiesced*** in the unconstitutional conduct." (Emphasis added). *Hays v. Jefferson County, Ky.*, 668 F.2d 869, 874 (6th Cir. 1982); *see also, City of Canton v. Harris*, 489 U.S. 378, 396-398 (1989).

The Panel's rejection of municipal liability in this case sets a new standard of when "knowing acquiescence" in unconstitutional conduct occurs. That decision should be reviewed and repudiated by the entire Court.

Respectfully submitted,

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CERTIFICATION

I hereby certify that I have, this 24th day of July, 2006, mailed a copy of the foregoing pleading to the following attorneys of record:

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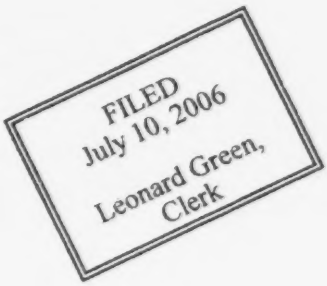
No. 05-5585

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RALPH TAYLOR,	)	
	)	**ON APPEAL FROM**
Plaintiff-Appellant,	)	**FROM THE UNITED**
	)	**STATES DISTRICT**
v.	)	**COURT FOR THE**
	)	**EASTERN DISTRICT**
CITY OF FALMOUTH, GENE FLAUGHER, DONALD ENGLAND, JANET FIELDS, MARY ANN SHIELDS, CLAY CLIFFORD, DON CROSS and VIRGILENE MOORE Individually and in their official capacities,	)	**OF KENTUCKY**
Defendants-Appellees.	)	



BEFORE: BATCHELDER and GRIFFIN, Circuit Judges, and ZATKOFF, District Judge.*

*The Honorable Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

PER CURIAM.

Plaintiff Ralph Taylor ("Taylor") appeals an order of the district court granting summary judgment in favor of defendants, the City of Falmouth, former mayor Gene Flaugher, and former City Council members Donald England, Janet Field, Mary Ann Shields, Clay Clifford, Don Cross, and Virgilene Moore, in their individual and official capacities. Taylor and his son, Shawn Taylor, initially brought suit alleging violations of his First, Fourth, Fifth, and Fourteenth Amendments rights and several state law claims arising out of the towing of Shawn Taylor's vehicle and an incident which occurred at a Falmouth City Council meeting when Donald England made a racial insult to Taylor.

For the reasons set forth below, we affirm the judgment of the district court.

I.

Ralph Taylor is an African-American resident of Falmouth, Kentucky. He is also the father of Shawn Taylor, an enlisted member of the United States Navy, a former party to this lawsuit and the owner of the vehicle in question. In August 1998, the vehicle, an inoperable 1988

Chevrolet Blazer, was parked on Taylor's property with expired Virginia license plates. At that time, the City of Falmouth ("City") had an ordinance prohibiting the "storage of motor vehicles in an inoperative condition...within the city limits except on premises authorized by the city for such purposes[.]" No. 93.03A-1994. Pursuant to the ordinance, the City issued several citations to Taylor and ultimately towed the Blazer to a local garage.

Taylor thereafter appeared in the Pendleton County District Court on the court date noted on the citation. The citation was ultimately dismissed upon motion of the prosecutor on October 6, 1998. According to Taylor, he asked about return of the vehicle while at the court and was told to contact the City about having the Blazer returned. Taylor further stated that he initially spoke with former Mayor Jim Hammond, who provided no suggestions about how to reacquire the vehicle. Additionally, Taylor spoke with Police Chief Greg Reis shortly after the citation hearing, and Reis told him he would have to speak with the City Council about return of the vehicle. Contrary to Taylor's recollection, Reis testified that he explained to

Taylor that it was up to the court to determine what would be done with the vehicle.

In any event, Taylor periodically attended the Falmouth City Council meetings to inquire about the vehicle over the next several years. Specifically, Taylor attended the December 29, 1998, and the June 8, 1999, Council meetings. The minutes from both meetings reflect that Taylor inquired into the status of the Blazer and was referred to Chief Reis. Taylor made no further inquiries until January 2002, when he again attended a Council meeting to ask about the vehicle. Council membership had undergone changes since Taylor last presented the matter in June 1999, and the Council was consequently unprepared to address the matter. Accordingly, the Council referred the matter to Gene Flaugher to investigate and report back at the next Council meeting. Although Taylor did not attend the next Council meeting in February 2002, Flaugher informed the Council that the garage to which the vehicle had been towed was no longer in business and the vehicle could no longer be located.

Nothing further transpired until the August 6, 2002, Council meeting when Taylor attended and again asked

about the vehicle. The minutes for the meeting reflect, in pertinent part, the following:

> Skip Taylor approached Council about the ongoing issue of a truck hauled away in 1998. City Clerk tried to tell Taylor that he would give him the insurance carrier and he could talk to them about the issue. Taylor said he wanted his truck. City Clerk said he didn't have anything to do with his truck being hauled away. At the time of this incident (1998) Falmouth had a City Administrator (Steve Hasson) who was making these calls. Taylor implied [Terry] England was responsible for removing his truck. After a verbal confrontation between Taylor and City Clerk, Council member [Donald] England asked both to be quiet and move on to something else. Taylor told Council member England he wasn't afraid of him. England, upset at this statement returned a verbal obscenity and invited Taylor outside to discuss it further. The City police intervened to calm the issue.

Although termed a "verbal obscenity," the parties do not dispute that Donald England called Taylor a "big black bastard" and invited him to "step outside." According to Taylor's deposition testimony, Taylor was speaking in the open session when England said, "I'm tired of you coming down here asking about that damn Blazer." Taylor stated that England was looking at the floor while speaking,

and then "called me a big black bastard and told me to come outside." After his remarks, Donald England exited the building. According to Taylor, he overheard "laughter at the council's table" at one point, and, in another, that he heard "nothing but just people just gasping." Regardless, Taylor "thanked [Council] for letting [him] address them," stated that he would be back the following month, told them that he was going home, and then exited the premises. Despite his efforts to leave, Taylor alleges that for thirty to forty-five minutes, Officer Ritchie and another officer prevented him from going home, detaining him on the steps of the building and explaining that there would be "no fighting on this sidewalk." Taylor also stated that at this point, another Council member and a police officer apparently also stepped outside to detain England, and no further confrontation occurred.

At the following month's Council meeting, Taylor was listed on the agenda and the vehicle was discussed. However, Taylor did not attend. He subsequently filed this lawsuit on July 1, 2003, on behalf of himself and his son Shawn. The bulk of Shawn Taylor's claims survived summary judgment and were subsequently settled. The district court granted summary judgment to defendants on

Taylor's claims alleging violations of his rights under the First, Fourth, Fifth, and Fourteenth Amendments. This timely appeal followed.

II.

We review a district court's grant of summary judgment de novo. *Terry Barr Sales Agency, Inc. v. All-Lock Co.*, 96 F.3d 174, 178 (6th Cir. 1996). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Upon the filing of a motion for summary judgment, the opposing party must come forth with sufficient evidence to withstand a motion for a directed verdict, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-52 (1986), particularly where there has been an opportunity for discovery, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The district court does not "weigh the evidence and determine the truth of the matter but [instead], determine [s] whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 249. For such a motion, the district

court views the evidence and draws all reasonable inferences in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III.

To adequately state "a claim under 42 U.S.C. § 1983, the plaintiff must properly allege two elements: (1) the defendant was acting under color of state law, and (2) the offending conduct deprived the plaintiff of rights secured under federal law." *Mezibov v. Allen*, 411 F.3d 712, 716-17 (6th Cir. 2005) (citation omitted), *cert. denied*, 126 S.Ct. 1911 (2006). Here, Taylor sued defendants as individuals and as Council members, and, in doing so, Taylor alleges a variety of constitutional claims. We will discuss each in turn.

A.

A plaintiff alleging retaliation for exercise of First Amendment rights must establish that: (1) plaintiff engaged in protected conduct; (2) an adverse action was taken against plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3)

there is a causal connection between elements one and two – the adverse action was motivated at least in part by plaintiff's protected conduct. *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc); *Bell v. Johnson*, 308 F.3d 594, 602 (6th Cir. 2002).

Like the district court, we will assume that Taylor was engaged in protected conduct. We will further assume that the adverse action, the racial insult, was motivated at least in part by Taylor's protected conduct.

Nevertheless, we are not persuaded that the alleged adverse statement was significant enough to establish that Taylor suffered a violation of constitutional magnitude. The district court aptly rejected the notion that "every action, no matter how small, is constitutionally cognizable." *Arnett v. Myers*, 281 F.3d 552, 560 (6th Cir. 2002) (citations omitted); *Ingraham v. Wright*, 430 U.S. 651, 674 (1977) ("There is, of course, a de minimis level of imposition with which the Constitution is not concerned."). From an objective standpoint, we hold that England's offensive remarks were a de minimis imposition on Taylor's exercise of his First Amendment rights.

Taylor, however, asserts that the racial insult, coupled with England's request to step outside (presumably

to fight), was hardly insignificant. Indeed, he contends the thirty to forty-five minute detention after the Council meeting confirms that "any reasonable African-American citizen would be chilled knowing that he or she may be subject to the same racist slur and heavy-handed conduct by the police if they were to criticize City Council at one of their meetings." In accordance with Taylor's arguments, we must "'tailor[ ]' our analysis under the 'adverse action' prong to the circumstances of this specific retaliation claim." *Mezibov*, 411 F.3d at 721 (considering "whether the alleged defamation would deter a criminal defense attorney of ordinary firmness from continuing to file motions and vigorously defend his client.") (citation omitted); *see Mattox v. City of Forest Park*, 183 F.3d 515, 522 (6th Cir. 1999) (formulating test under "adverse action" prong for elected City Council member as to whether a "public official of ordinary firmness" would be deterred from exercising her First Amendment rights). Accordingly, the Court must consider whether England's comments would deter a reasonable African-American citizen from continuing to speak out at City Council meetings.

In this case, the district court distinguished Taylor's allegations of adverse *statements* from adverse *actions*

previously held to violate the First Amendment. This distinction is consistent with our precedent; indeed, we have found *conduct*, such as destroying duck blind structures in retaliation for speaking out against management practices, *Arnett*, 281 F.3d at 560, confiscating an inmate's food and legal papers in retaliation for filing civil-rights suits, *Bell*, 308 F.3d at 602, and deliberate harassment and moving an inmate to a mentally-ill inmate area and serving cold meals all in retaliation for filing a lawsuit, *Thaddeus-X*, 175 F.3d 378, were all sufficient evidence of adverse action to survive summary judgment. We have not, however, specifically stated that *verbal abuse* is sufficient (or insufficient) evidence of adverse action.

Notably, the Fifth and Eighth Circuits have both held that "[m]ere allegations of verbal abuse do not present actionable claims under § 1983." *Bender v. Brumley*, 1 F.3d 271, 274 n.4 (5th Cir. 1993); *see Doe v. Gooden*, 214 F.3d 952, 955 (8th Cir. 2000). Specifically, in *Doe*, the court held that a teacher's foul language, telling students that their handwriting "sucks," telling students that "if you had one eye and half a brain, you could do this," calling students "stupid," and referring to students as "bimbos,"

"fatso," and the "welfare bunch," was not sufficient adverse action because "[v]erbal abuse is normally not a constitutional violation." *Doe*, 214 F.3d at 955. The Eighth Circuit has also specifically distinguished verbal abuse from action. *Compare Naucke v. City of Park Hills*, 284 F.3d 923, 928 (8th Cir. 2002) (noting that "[i]n some cases, embarrassment, humiliation and emotional distress may be sufficient to support a § 1983 claim...[b]ut, it would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable..." (internal quotation marks and citations omitted)) *with Garcia* v. *City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003) ("[I]n contrast to *Naucke*, defendant's conduct went beyond mere speech, however offensive. Defendant, in his capacity as Mayor, engaged the punitive machinery of government [the issuance of parking tickets] in order to punish [plaintiff] for her speaking out.") Similarly, although we have held that "in some cases injury based on embarrassment, humiliation, and emotional distress" is sufficient to maintain a § 1983 action, *Mattox*, 183 F.3d at 521 (internal quotation marks and citation omitted), we have also cautioned that "§ 1983 is a tort statute, [and] we must be careful to ensure that real injury is

involved, lest we 'trivialize the First Amendment' by sanctioning a retaliation claim even if it is unlikely that the exercise of First Amendment rights was actually deterred." *Mezibov*, 411 F.3d at 721 (quotation marks and citation omitted). Such a caution applies to the instant case.

Accordingly, we hold that Taylor has failed to establish a prima facie violation of his First Amendment rights so as to state a retaliation claim under § 1983.

B.

Taylor next contends that the Council engaged in racially intimidating conduct, thereby depriving him of the equal protection of the laws. After engaging in a detailed discussion of our equal protection precedent, the district court concluded that "there is no binding circuit authority that a single racial slur is sufficient to support a claim for an equal protection violation." Taylor, however, urges this Court to consider both the alleged threat of bodily harm England directed at him and the confiscation of his son's vehicle in conjunction with England's racial slur. Taylor submits that an equal protection claim arises where, as here, a public official has made offensive remarks that are

accompanied by harassment or some other conduct to deprive a victim of established rights.

The Equal Protection Clause of the Fourteenth Amendment provides that "no State shall deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV. One member of this court recently stated, albeit in an unpublished opinion, that "[t]he use of racially discriminatory language can provide some evidence of a discriminatory purpose when that language is coupled with some additional harassment or constitutional violation," although "[t]he use of a racial epithet by itself is not an actionable violation of the Equal Protection Clause." *King v. City of Eastpointe*, 86 F. App'x. 790, 814 (6th Cir. 2003) (Moore, J., concurring in part and dissenting in part) (citation omitted) ("The occasional or sporadic use of racial slurs, although unprofessional and reprehensible, does not rise to a level of constitutional magnitude."); *Williams v. Bramer*, 180 F.3d 699, 706 (5th Cir.) ("[A]n officer's use of a racial epithet, without harassment or some other conduct that deprives the victim of established rights, does not amount to an equal protection violation."), *clarified on reh'g*, 186 F.3d 633 (5th Cir. 1999).

Here, although Taylor contends that the physical threat and detention satisfies the "harassment or other conduct" requirement, we are not persuaded. We conclude that the district court correctly held that the totality of the actions alleged by Taylor did not transform the outburst and following separation into a deprivation of constitutional rights.

IV.

Taylor further argues that liability must be imputed to the municipality of Falmouth because of the Council's inaction following England's outburst. The district court held, and we agree, that § 1983 liability cannot be imputed to the municipality of Falmouth. Although Taylor contends that, pursuant to *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), "a single decision may constitute an act of official government policy" and such a policy was established here, we disagree. *See Doe v. Claiborne Cty., Tenn.*, 103 F.3d 495,508 (6th Cir. 1996) ("To state a municipal liability claim under an 'inaction' theory, [plaintiff] must establish...the School Board's tacit approval of the unconstitutional conduct, such that their deliberate indifference in their failure to act can be said to amount to an official policy of inaction...").

The totality of the events Taylor has alleged cannot be said to represent "official policy." Although Taylor asserts that the other Council members "knowingly acquiesced" in the racial insult and subsequent detention, *see Hays v. Jefferson Cty., Ky.*, 668 F.2d 869, 874 (6th Cir. 1982), the district court held, and we agree, that the record does not reflect that the Council tacitly approved of either.

V.

Because Taylor does not state a sufficient cause of action against the Council members in their official capacities, we need not address the balance of Taylor's complaints against the officials and Council members in their individual capacities. *Accord Leach v. Shelby Co. Sheriff*, 891 F.2d 1241, 1246 (6th Cir. 1990) (Officials are generally held personally responsible only for their own unconstitutional actions, rather than a "mere failure to act."); *Hicks v. Frey*, 992 F.2d 1450, 1455 (6th Cir. 1993) (holding that "[a]t a minimum, a § 1983 plaintiff must show that [an] official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers") (citation omitted).

Affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

FILED
March 9, 2005
Eastern District
of Kentucky,
Clerk

CIVIL ACTION NO. 03-142-DLB

RALPH TAYLOR, ET AL. **PLAINTIFFS**

vs. **OPINION AND ORDER**

CITY OF FALMOUTH, ET AL. **DEFENDANTS**

****

This is a § 1983 action brought by Plaintiffs for alleged violations of their rights under the First, Fourth, Fifth and Fourteenth Amendments. Plaintiffs also include a state law conversion claim based upon supplemental jurisdiction.

The case is presently before the Court on Defendants' Motion for Summary Judgment on all claims (Doc. #18), and Plaintiffs' Motion for Partial Summary Judgment on their § 1983 procedural due process and state law conversion claims (Doc. #17). Oral arguments were presented on the motions on February 25, 2005. Subsequent

thereto, the parties filed of record their deposition discovery, and Plaintiffs have also sought leave to file supplemental authority. (Doc. #48) These matters are now ripe for adjudication. For the reasons that follow, Plaintiff Shawn Taylor is granted summary judgment on his procedural due process claim, and Defendants are granted summary judgment on all other claims with the exception of Shawn Taylor's procedural due process, Fourth Amendment, state law conversion, and punitive damage claims; and Officer Lowery's claim for qualified immunity.

I. Factual and Procedural Background

This case arises from the towing of a vehicle from private property. Ralph Taylor is a resident of Falmouth, Kentucky. He also owns or owned separate rental property in Falmouth.[1] Parked on that rental property, behind a mobile home, was a wrecked 1988 Chevrolet Blazer. The vehicle displayed expired Virginia license plates. The vehicle was titled to Ralph Taylor's son, Plaintiff Shawn Taylor. Shawn Taylor has been enlisted in the United States

[1] It is unclear from the record in whose name the rental property was titled in August of 1998, the relevant time in question.

Navy since 1988, though still lists his parents' residence in Falmouth as his primary residence.

The City of Falmouth in 1994 enacted an ordinance directed to the elimination of nuisances from private properties within the City. That ordinance, No. 93.03A-1994, reads in pertinent part:

> SECTION 4: CERTAIN CONDITIONS DECLARED A NUISANCE. It shall be unlawful for the owner, occupant, or person having occupancy control or management of any land or property within the city to permit a public nuisance to develop thereon. The following conditions are declared to be public nuisance.
>
> ....
>
> (H) Junk; scrap metal; motor vehicles. The storage of motor vehicles in an inoperative condition, motor vehicles unfit for further use, automobile parts, or scrap metal within the city limits except on premises authorized by the city for such purposes[.]

On August 22, 1998, Defendant Essell Lowery, then a Falmouth Police Officer, wrote out a citation to Ralph Taylor for violation of this nuisance ordinance. Lowery testified that he and Officer Bex noticed the vehicle while

out on routine patrol.[2] He said he and Officer Bex noticed two crumpled 7-day warnings previously written by Officer Bex on the ground next to the Blazer. After spying the crumpled prior notices, the Officers concluded Ralph Taylor had already been given notice to abate the nuisance on his property and had failed to do so within the 14 days required by the two 7-day warnings.[3] Arrangements were then made to have the vehicle towed at that time to a local garage.[4] Ralph Taylor came upon the scene as the vehicle

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[2] At oral argument counsel confirmed that Defendant Luke Sex, formerly with the Falmouth Police Department, has not been served with process nor has an answer been filed on his behalf, despite general inadvertent reference to Defendant Sex as being included in the dispositive motion filings. All claims against Defendant Sex will therefore be dismissed without prejudice for failure to effectuate service of process.

[3] The source for this 7-day time period is not clear. The ordinance itself does not contain a 7-day provision. Rather, it says the City Clerk shall mail to the owner of the property where the nuisance is located a notice for the owner to abate the nuisance within 5 days.

[4] Plaintiffs have suggested that Mayor Flaugher directed the Taylor vehicle be towed. The record on this point is not clear. Defendant Gene Flaugher testified that after becoming mayor he did send out notices and has ordered vehicles be towed. However, Flaugher was a

was being towed. He testified the officers handed him the citation. The citation reflects that it was issued on August 22, 1989 [sic 1998] to Ralph Taylor.[5] The charging conduct is listed as "vehicle parked at above address with expired tags; wrecked front end. Violation of City Ord. 93.03 junk vehicle; vehicle was towed to Top Shop Garage."[6] The Citation also lists a court date of September 8, 1998, to appear on the citation charges.

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council member in 1998 and was not appointed mayor until late 1999. He testified that he knew nothing about the Taylor vehicle being towed until Ralph Taylor appeared at a council meeting requesting return of the vehicle. On the other hand, then Police Chief Reis testified his recollection was that the vast number of complaints about vehicles came in from Flaugher, who would give him lists of cars, whose status would then be investigated by the police department. Officer Lowery testified he does not recall anyone from city council directing or asking him to tow the Taylor vehicle, but rather that he made that judgment call after observing the vehicle while on patrol.

[5] Ralph Taylor's nickname is "Skip" Taylor; the citation was actually issued to Skip Taylor.

[6] The citation as initially written listed the name of another local garage. Officer Lowery testified that the dispatcher notified him that garage was unable to pick up the vehicle at that time. Officer Lowery marked through the name of the garage listed on the original copy of the citation and instead wrote in Top Shop Garage.

Though the parties dispute whether prior warnings were written or verbal, Ralph Taylor does not deny that he received prior warnings about the vehicle. He testified that approximately a week prior to the towing, he contacted Defendant and then Police Chief Greg Reis to inquire about there being a problem with the vehicle. Taylor testified Chief Reis asked him to turn the vehicle around so that the wrecked front end would be facing away from the public street, and that he did so. Ralph Taylor appeared in the Pendleton County District Court for the September 8, 1998, court date noted on the citation. The citation was ultimately dismissed upon motion of the prosecutor on October 6, 1998. The transcript of the district court proceedings provided by the parties is brief and says nothing about the status of the vehicle. Ralph Taylor testified that he asked about return of the vehicle while at court and was told to see the City about having the Blazer returned. Taylor testified that he initially spoke with the then Mayor, Jim Hammond, who gave him no insight on getting back the vehicle. Taylor said he also spoke with Chief Reis shortly after the court disposition, and that Reis told him he would have to speak with council about return of the vehicle. Reis,

on the other hand, testified that it was up to the court to determine what would be done with the vehicle.

In any event, over the next several years Ralph Taylor periodically attended the Falmouth City Council meetings to inquire about the vehicle.[7] Taylor attended the December 29, 1998, council meeting and asked that the vehicle be returned. The minutes reflect council advised him Chief Reis would handle the matter. There is no indication from the record that Taylor met with Reis after this City Council meeting or the outcome of any meeting that did occur.

Six months later Taylor attended the June 8, 1999, council meeting. The minutes reflect he again asked whether the City intended to return the vehicle taken from his property. Then Mayor Jim Hammond advised Taylor to speak with Chief Reis about the matter the following morning. Taylor said he did not meet with Reis the next day, since he had already spoken with Reis in the days immediately after the vehicle was towed.

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[7] Taylor acknowledged that he informally learned in 1999 from the garage owner that the Blazer had been crushed, but continued to ask council for return of the vehicle since he had never seen paperwork confirming that the vehicle had, in fact, been destroyed.

Two and a half years then went by. On January 2, 2002, Taylor attended a council meeting again asking that the vehicle be returned. Council membership had undergone some changes since Taylor last presented the matter in June of 1999. Council referred the matter to the new mayor and former council member, Gene Flaugher, to investigate and report back at the next council meeting. Mayor Flaugher was asked to try and locate the Blazer and investigate the waterline damage Taylor claims occurred during removal of the vehicle from his property. Taylor did not attend the February, 2002 meeting, but the minutes reflect Mayor Flaugher nevertheless gave the following update:

> Mayor said City Clerk (Terry England) had checked on the Ralph Taylor issue. City Clerk said Taylor was cited to court in 1998 on possible violation of the City's junk and debris Ordinance. The truck was apparently towed to Top Shop, which is no longer in business. The court records show the issue was dismissed on motion of the Commonwealth, but says nothing about returning the vehicle. Apparently the truck was hauled away for junk and could not be found. As for Taylor's claim that the water bill at the old trailer park was created when the vehicle was towed away - that could not be determined as the cause of the water leak.

Nothing more transpired on the matter until the August 6, 2002, City Council meeting. Taylor attended this meeting, once again asking about the vehicle. The minutes reflect the following transpired:

> Skip Taylor approached Council about the ongoing issue of a truck hauled away in 1998. City Clerk tried to tell Taylor that he would give him the insurance carrier and he could talk to them about the issue. Taylor said he wanted his truck. City Clerk said he didn't have anything to do with his truck being hauled away. At the time of this incident (1998) Falmouth had a City Administrator (Steve Hasson) who was making these calls. Taylor implied [Terry] England was responsible for removing his truck. After a verbal confrontation between Taylor and City Clerk, Council member [Donald] England asked both to be quiet and move on to something else. Taylor told Council member England he wasn't afraid of him. England, upset at this statement returned a verbal obscenity and invited Taylor outside to discuss it further. The City police intervened to calm the issue.

What is noted in the minutes as a "verbal obscenity" by Donald England was England's calling Taylor a "black bastard" and inviting him to step outside. Donald England proceeded to exit the building. Taylor finished addressing

council and then exited the premises. At this point another council member and a police officer had also stepped outside; no further confrontation occurred.

Taylor was listed on the agenda for the following month's council meeting. He did not, however, attend the September 3, 2002, meeting. The minutes from that meeting reflect, though, that the city attorney offered his opinion that the statute of limitations had expired and that the owner of the vehicle was unclear. The city attorney offered to procure the court tape if available to see what the judge had stated about the vehicle.

This lawsuit was then filed on July 1, 2003, on behalf of both Ralph and Shawn Taylor. The Complaint sets forth a number of claims on behalf of Plaintiffs collectively. They can generally be described as claims for deprivation of Plaintiffs' procedural and substantive due process rights, equal protection rights, First and Fourth Amendment rights, conspiracy, and state law conversion. For ease of reference, analysis of the claims is separated according to each Plaintiff.

II. Analysis

A. Summary Judgment Standard

The proper standard for entry of summary judgment is well known. Federal Rule of Civil Procedure 56(c) provides, in pertinent part, as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Id. The moving party bears the initial burden of establishing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To meet this burden, the moving party may rely on any of the evidentiary sources listed in Rule 56(c) or may rely upon the failure of the nonmoving party to produce any evidence which would create a genuine dispute for the jury. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989). Essentially, a motion for summary judgment is a means by which to challenge the opposing party to "put up or shut up" on a critical issue. *Id.*

Once the moving party has met its burden of production, the nonmoving party cannot rest on its pleadings, but must present significant probative evidence in support of its complaint to defeat the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). "The mere presence of a scintilla of evidence in support of the plaintiffs position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252. Summary judgment is properly granted if the party who would bear the ultimate burden of proof at trial fails to establish an essential element of the claim. *See Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 941 (6th Cir. 1995). If the evidence is insufficient to reasonably support a jury verdict in the nonmoving party's favor, the motion for summary judgment will be granted. *Street*, 886 F.2d at 1477.

B. Claims of Ralph Taylor

1. General Overview

Though in his Complaint Ralph Taylor presented a myriad of claims connected with both the August 22, 1998, citation and the August 6, 2002, council meeting, on

dispositive motion filings he does not protest that any § 1983 claims he alleged arising from the 1998 towing are time-barred under Kentucky's one-year personal injury statute applicable to § 1983 actions. *Cox v. Treadway*, 75 F.3d 230, 240 (6th Cir. 1996). Taylor clarifies that at this stage of the proceedings any § 1983 claims he brings are based solely upon the August 6, 2002, verbal attack and threat of physical harm directed at him by Defendant Donald England.

The Chevrolet Blazer at issue was, at all times relevant hereto, titled to Shawn Taylor. Therefore, as for any other claims by Ralph Taylor associated with the 1998 vehicle tow, Taylor acknowledges that he is without standing to pursue these claims.

Given this as the defined scope of Plaintiff Ralph Taylor's claims, he no longer states any claims against Defendants Reis or Lowery; his claims are against the council members and the City of Falmouth. The crux of Ralph Taylor's claims at this juncture are his assertions that, because of council member Donald England's comment and threat, he was retaliated against for speaking out and petitioning his government and denied equal protection.

2. The City of Falmouth and Council Defendants in their official capacities did not act pursuant to a policy or custom

Municipalities can be sued directly under § 1983 where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or a custom or usage of the municipality having the force of law. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690-91 (1978). An individual sued in his official capacity is in actuality a suit against the government entity itself. *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 752 (6th Cir. 2004). In this case, each of the Defendants was also sued in his/her official capacity, thus the suit is essentially one against the City of Falmouth.

Defendants argue that all § 1983 claims against them in their official capacities should be dismissed because there is no issue as to whether the City of Falmouth had a policy or custom in place which was the moving force behind Ralph Taylor's alleged constitutional deprivations. Specifically, Defendants offer that there is no evidence that Defendant England was acting pursuant to a policy or custom when, during the August 6, 2002,

meeting, he called Ralph Taylor a black bastard and challenged him to step outside.

Ralph Taylor, on the other hand, contends that the record in this case, taken as a whole, has ample evidence of a City policy or custom of allowing racist comments against citizens exercising their First Amendment right to address council. He impliedly contends that Defendants' failure to prohibit racist comments represents a custom or policy of inaction or deliberate indifference. *Stemler v. City of Florence*, 126 F.3d 856, 865 (6th Cir. 1997). To hold the City liable, Taylor must show a clear and persistent pattern of racial abuse by council members toward those addressing council; notice or constructive notice on the part of the City; tacit approval of the misconduct such that the deliberate indifference in failing to act can be said to amount to an official policy of inaction; and that the custom or policy of inaction was the moving force in the constitutional deprivation. *Doe v. Claiborne County, Tenn.*, 103 F.3d 495, 508 (6th Cir. 1996). Where a plaintiff "advances sufficient evidence to create a genuine issue of material fact as to the existence of such custom or policy, then the question of 'deliberate indifference' becomes one

for the jury to decide and not for the court at the summary judgment stage." *Id.* at 509.

Application of this test to the circumstances herein reveals Taylor cannot survive summary judgment. Taylor can point to no evidence of a clear and persistent pattern of racist comments or abuse by council members that was tacitly approved. Though Taylor *says* in his filings that there is ample evidence of permitting racist comments against citizens exercising their right to address council, he points to no specific *evidence* demonstrating this other than the August 6, 2002, episode. Therefore, there is insufficient evidence to create a jury question of whether the City had in place a custom of condoning the use of racial remarks.

3. The Council Defendants are not liable in their individual capacity as their failure to act in response to England's comments did not cause the alleged deprivation of Ralph Taylor's constitutional rights

Each of the council Defendants, with the exception of Donald England, assert that Taylor's individual capacity claims against them must be dismissed because they were not involved in the "black bastard" comment or the threat to continue matters outside, but rather were involved only to the extent that they were present at the meeting when

England made the remarks. Taylor, in turn, relies upon Defendants' failure to do or say anything about England's remarks as a legal basis for pursuing claims against them in their individual capacity.

"[T]o establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)(emphasis in original). The cases dealing with imposing individual liability upon an official not directly involved in the alleged unconstitutional conduct have generally involved the concept of supervisory liability. In this context, the cases note that generally officials are held personally responsible only for their own unconstitutional actions, rather than a "mere failure to act." *Leach v. Shelby Co. Sheriff*, 891 F.2d 1241, 1246 (6th Cir. 1990); *Davis v. Fentress Co. Tennessee*, 6 Fed. Appx. 243, 250 (6th Cir. 2001). An official can be held liable for failure to supervise and control subordinates only where he "either encouraged the specific incident of misconduct or in some other way directly participated in it." *Hicks v. Frey*, 992 F.2d 1450, 1455 (6th Cir. 1993). At a minimum, a § 1983 plaintiff must show that the official at least

implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers. *Id.*

Neither of the parties has cited to authority other than that involving the imposition of supervisory individual liability. But even if this standard is applied to the circumstances herein, and accepting for purposes of discussion that England did engage in unconstitutional conduct, Plaintiff has failed to establish individual liability as to the other council members. The other members of council did not take part in the remarks themselves. The council members were deposed, and each indicated they were not aware of any other incidents in which council members had used racially offensive language. The incident at the August 6, 2002, meeting can reasonably be described as an outburst on the part of England, spoken within a matter of seconds. Active behavior is required in condoning the alleged unconstitutional behavior, not tacit approval in a passive role. *Bass v. Robinson*, 167 F.3d 1041, 1048 (6th Cir. 1999).

The record reveals the conduct and involvement of the council members did not rise to such a level that it amounted to active, individual participation in the alleged

unconstitutional behavior. Plaintiff's complaint that the council's failure to intervene to stop the conduct rises to the level of active unconstitutional behavior is rejected, given the brief nature of the outburst and inability to stop England's remarks before they were spoken. Compare, for example, the situation where an officer stands by and watches in silence as his fellow officer embarks upon a course of unnecessarily beating a handcuffed arrestee. Silence and a failure to intervene in that situation carry implications of constitutional liability that simply are not implicated in circumstances such as these, where a group of city council members observe an inappropriate outburst. Plaintiff essentially seeks to impose constitutional liability against the members simply for being there. Without some specific authority supporting such an interpretation of individual capacity liability, which Plaintiff does not provide, the Court finds the limits of personal liability for officials does not stretch to this extent. And though Plaintiff complains that city council failed to punish England for this lone incident and to apologize to him, he has not pointed to any authority which would support the conclusion that a failure to meet his expectations is a sufficient basis for

imposing individual liability on the other council members.[8]

4. The Speech and Debate Clause does not afford immunity for individual capacity liability to Defendant England

England maintains he is immune from individual liability for his remarks at the August 2002 meeting pursuant to the Speech and Debate Clause. Because, claims England, he made the remarks in conjunction with his role as a lawmaker and during an official lawmaking session,

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[8] Plaintiffs Motion for Partial Summary Judgment also seeks award of a judgment in his favor against Defendant England as a Civil Rule 37 sanction for his failure to respond to certain deposition questions. Specifically, Plaintiff questioned England about which, if any, council members agreed with the remark he directed to Ralph Taylor at the August 6, 2002, meeting. England refused to answer these questions. Plaintiff submits that under Rule 37(b), judgment against England is an appropriate sanction for failing to respond to the questions. The Court disagrees. Resolving England's failure to respond to such questions should have been pursued during the discovery course of these proceedings. Moreover, each of the council members was deposed and indicated he or she knew of no other racial remarks having previously occurred in councilor by a council member. Whether a member agreed or disagreed with Taylor's isolated remark, for whatever reasons, is tacit behavior in a passive role and not active unconstitutional behavior.

the Clause provides immunity to him. He notes that the Clause has been interpreted broadly, covering actions by legislators within the legislative chamber rather than speech or debate exclusively. England does not argue about the propriety of his remarks, just that it does not matter how repugnant comments may be if the Clause applies to the situation.

Taylor's challenge to England's Speech and Debate Clause argument focuses upon England's threat of physical harm by his suggestion to take the matter outside. The Speech and Debate Clause, notes Taylor, does not afford protection to criminal conduct threatening a person's security or their property. Taylor fails to address whether England's other "black bastard" comment can be the subject of the Clause.

The United States Constitution provides that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." U.S. Const. Art. I, § 6. This Federal Speech and Debate Clause does not, however, apply to the states. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 404 (1979); *see also United States v. Gillock*, 445 U.S. 360, 374 (1980)("The Federal Speech or Debate

Clause, of course, is a limitation on the Federal Executive, but by its terms is confined to federal legislators."). State legislators are afforded absolute immunity while acting in a legislative capacity not because of the Federal Speech and Debate Clause, but because federal law "recognizes the need for immunity to protect the 'public good.'" *Lake Country Estates*, 440 U.S. at 404-05. The Sixth Circuit has extended the holding of *Lake Country Estates* by finding that "legislators of any political subdivision of a state are absolutely immune from liability under 42 U.S.C. § 1983 insofar as they are acting in a legislative capacity." *Haskell v. Washington Township*, 864 F.2d 1266, 1277 (6th Cir. 1988).

This does not, however, answer the question of whether Donald England is entitled to immunity for his actions at the August 6, 2002, council meeting, as the scope of his immunity depends upon the nature of the activity. *Id.* at 1278. Officials acting in a judicial or legislative capacity are entitled to absolute immunity; only qualified immunity applies to actions of an administrative nature; and no immunity is afforded if the conduct falls under none of these categories. *Id.* The parties have pointed out no factually similar authority, nor has the Court's research

located such. However, it is clear the specific remarks at issue were offered not in conjunction with establishing general policy so as to be legislative activity. They were not offered by England as an essential part of the legislative process nor for the promotion of public welfare. Since England's remarks were in conjunction with a circumstance involving Taylor specifically, the more likely characterization would be administrative or executive, if it fell within any category at all. Even so, qualified immunity is appropriate only if the executive or administrative discretionary action was taken within the scope of the official's duties and with a reasonable belief it was lawful. *Id.* at 1277 (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818.

The record suggests England's outburst was done in furtherance of personal rather than public interests, circumstances would not appear to support immunity. However, any further analysis in this regard is deferred so

as to consider whether England's conduct in fact violated Plaintiffs constitutional rights.

5. There is no genuine issue of retaliation against Ralph Taylor for exercise of First Amendment rights

Taylor describes this claim as one for retaliation for exercising his First Amendment rights. A plaintiff alleging retaliation for exercise of First Amendment rights must establish that (1) plaintiff engaged in protected conduct; (2) an adverse action was taken against plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two – the adverse action was motivated at least in part by plaintiff's protected conduct. *Bell v. Johnson*, 308 F.3d 594, 602 (6th Cir. 2002).

Taylor submits that he has established a *prima facie* case of retaliation. Taylor says he was engaged in First Amendment protected conduct while addressing Council at the meeting, and that adverse action was taken against him by council member England for doing so. Taylor claims his First Amendment rights were chilled, evidenced by the fact he did not attend the next meeting. Lastly, Taylor argues the necessary causal connection is shown, given that

England's outburst was driven by his repeated petition of the council for relief on his son's behalf. Though this is a creative legal theory advanced by Ralph Taylor, its actual application here falls short of establishing a *prima facie* case to survive summary judgment.

First, whether Taylor's conduct was in fact conduct protected by the First Amendment is questionable. The right to free speech and right to petition "are related and generally subject to the same constitutional analysis." *Wayte v. United States*, 470 U.S. 598, 610 n.11 (1985); *Valot v. Southeast Local Sch. Dist. Bd.* of *Educ.*, 107 F.3d 1220, 1226 (6th Cir. 1997)(a claim based on the right to petition "is subject to the same analysis applied to a claim arising under the Speech clause."). The First Amendment recognizes "the importance of 'uninhibited, robust, and wide-open' debate on public issues." *Frisby v. Schultz,* 487 U.S. 474, 479 (1988)(quoting *New York Times* Co. *v. Sullivan*, 376 U.S. 254, 270 (1964)). In this case, Taylor's presentation to council was not so much that on a matter of public concern or public issue as a request for private action as to him.

Moreover, city council meetings are not the typical example of a public forum, but rather involve speech of

public concern and interest in a more structured situation as might occur in a limited public forum. Government has a legitimate interest in conducting efficient, orderly business. *Jones v. Heyman,* 888 F.2d 1328, 1333 (11th Cir. 1989)(mayor's interest in controlling the agenda and preventing the disruption of public meetings is significant governmental interest); *Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 176 n.8 (1976)("[p]lainly, public bodies may confine their meetings to specified subject matter .... ").

> We are dealing not with words uttered on the street to anyone who chooses or chances to listen; we are dealing with meetings of the Norwalk City Council, and with speech that is addressed to that Council. Principles that apply to random discourse may not be transferred without adjustment to this more structured situation... [A] city Council meeting is ... a governmental process with a governmental purpose. The Council has an agenda to be addressed and dealt with. Public forum or not, the usual first amendment antipathy to content-oriented control of speech cannot be imported into the Council chambers intact.

White v. City of *Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990). Speech may be regulated as to time, place, and

manner where the restriction is content-neutral, not because of disagreement with the message it conveys. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

In this case though not on the meeting agenda, Taylor was permitted to speak during the open session at the end of the meeting. He was not initially prevented from speaking. He had, in fact, appeared at council meetings on at least three prior occasions to speak about his son's towed vehicle. These prior appearances had been endured by the council members and had taken place without incident. The Court's review of the record reveals the actions of England at the August, 2002, meeting were taken in an effort to restore order and return to council business, albeit a very poorly chosen way of attempting to do so.

> [T]he nature of a Council meeting means that a speaker can become "disruptive" in ways that would not meet the test of actual breach of the peace, or of "fighting words" likely to provoke immediate combat. A speaker may disrupt a Council meeting by speaking too long, by being unduly repetitious, or by extended discussion of irrelevancies. The meeting is disrupted because the Council is prevented from accomplishing its business in a reasonably efficient manner. Indeed, such conduct may interfere with the rights of other speakers.

White, 900 F.2d at 1425-26 (citations omitted). Here, the testimony from council members reveals that Taylor's presentation at that meeting turned into a protracted, loud, and argumentative exchange between Taylor and city clerk Terry England. Under circumstances such as these, it is within council's authority to restore decorum and order and proceed on with council business. Apparently in an effort to do so, council member Donald England asked them both to stop talking so that they could move on. He testified that in response, Taylor stated "I'm not afraid of you," which in turn prompted England to lash out by calling Taylor a "black bastard" and asking him to step outside. Though the effort to restore order wound up having the opposite effect, attempting to do so here evidences Taylor was not engaged in conduct protected by the First Amendment. That is, he was not speaking out on a matter of public concern and council had the authority to stop him from speaking because it had become disruptive to the business of council.

Taylor, on the other hand, testified he had not raised his voice, was not arguing, nor had the discussion between he and Terry England become heated, that he never heard anyone tell him and Terry England to shut up, nor did he state he was not afraid of Donald England. He testified he

simply heard a voice state "I'm tired of hearing you ask about that goddamn vehicle", looked up and saw Donald England talking, at which point England called him a big black bastard and invited him to step outside. To avoid summary judgment, Taylor must point to evidence on which the jury could *reasonably* find for him. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The accuracy of Taylor's recollection is questionable, given the testimony offered by other council members and the fact that Taylor had addressed council on prior occasions without incident. Nevertheless, assuming Taylor was engaged in protected conduct because he was speaking on a matter of public concern and because his presentation was not disruptive, Taylor still fails to show adverse action necessary for a retaliation claim.

Taylor must show that an adverse action was taken against him that would deter a person of ordinary firmness from continuing to engage in that conduct. Taylor seeks to rely upon the black bastard remark and threat to take it outside from council member England as the adverse *action*. The Sixth Circuit has noted that not every action is constitutionally cognizable, and that there is a *de minimis* level of imposition with which the Constitution is not

concerned. *Arnett v. Myers*, 281 F.3d 552, 560 (6th Cir. 2002). The Sixth Circuit has found such conduct as destroying duck blind structures in alleged retaliation for speaking out against management practices, *id.*, confiscating an inmates food and legal papers in alleged retaliation for filing civil rights suits, *Bell v. Johnson*, and deliberate harassment and moving inmate to mentally ill inmate area and serving cold meals in retaliation for filing lawsuit, *Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999)(*en banc*) were all sufficient evidence of adverse action to take the case to the jury. Taylor relies upon the *Thaddeus-X* decision to support his claim; however, *Thaddeus* involved actual adverse *actions*. Taylor has not cited to any authority supportive of the proposition that an isolated outburst by a lone official constitutes an adverse *action* for purposes of a First Amendment retaliation claim.

Nor has Taylor shown that a person of ordinary firmness would be deterred from continuing to exercise First Amendment rights by speaking out at council meetings. England's outburst was unprofessional, insensitive, and inappropriate. The distress Taylor alleges as a result of this outburst, however, would be insufficient to deter a person of ordinary firmness from continuing to

speak out. Indeed, the record reflects that Taylor, in the face of this outburst, continued to speak out and address council, concluding his remarks by telling council that he would be back next month to ask again for the vehicle. Given these circumstances, the Court finds Taylor has failed to establish a violation of his constitutional rights in this regard so as to state a claim under § 1983.

6. The isolated outburst of council member England is insufficient to give rise to a deprivation of constitutional magnitude violative of the Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws. Taylor asserts that England's conduct denied him the equal protection guaranteed to him under the Equal Protection Clause. Defendants seek summary judgment on this claim, referencing several cases as holding that a racial slur or racial epithet alone does not give rise to an equal protection claim. Taylor responds that, contrary to Defendants' representations, it is not the remark alone that forms his claim, but also the threat of bodily harm England directed to him. Taylor submits that an equal protection claim is recognized in circumstances where a public official

has made offensive remarks that are accompanied by harassment or some other conduct that deprives a victim of established rights.

The cases Defendants rely upon do generally provide that isolated racial slurs do not give rise to an equal protection claim. See *Oliver v. Guttier*, 968 F. Supp. 83, 88 (ED.N.Y. 1997)(officer's use of racial slurs, alone, during arrest fails to state an equal protection claim); *Lee v. Mackay*, 29 Fed. Appx. 679, 680 (2d Cir. 2002)(equal protection claim not cognizable based alone on corrections officer who allegedly made racial comments while delivering inmate's food); *see also Owens v. Johnson*, 221 F.3d 1335, 2000 WL 876766, at *2 (6th Cir.)(unpublished table decision)("the occasional or sporadic use of racial slurs, although unprofessional and reprehensible, does not rise to a level of constitutional magnitude").

Though the cases relied upon by Defendants involved law enforcement officers, Taylor has not pointed out any reason why this principle should not be applied in the council setting herein. Indeed, Taylor acknowledges this standard, but then notes that racial comments can be sufficient if coupled with harassment or some other conduct depriving plaintiff of established rights. To support this

argument, Taylor cites *Williams v. Bramer*, 180 F.3d 699 (5th Cir. 1999). In *Bramer* the Fifth Circuit noted that "To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class." *Id.* at 705. In *Bramer* an African-American plaintiff was detained by one officer who allegedly choked him while searching his mouth. A second officer who arrived on the scene but who did not participate in the choking incident, when asked by plaintiff for his badge number, responded but also used a racial epithet. The *Bramer* court concluded this conduct was insufficient to give rise to an Equal Protection Clause claim. *Id.* at 707. In so holding, the Fifth Circuit distinguished an earlier decision, *Johnson v. Morel*, 876 F.2d 477 (5th Cir. 1989) where the officer, while continuously transmitting racial slurs and epithets over the vehicle's loud speaker, pushed plaintiff's broken-down car down a decline at an unsafe speed, then humiliated and harassed him using racist comments before handcuffing and arresting him. *Id.* at 705. In comparing the conduct at issue with that at issue in *Johnson*, the *Bramer* court ultimately held that "an officer's use of a racial epithet, without harassment or some other

conduct that deprives the victim of established rights, does not amount to an equal protection violation." *Id.* at 706. The court noted that an official's use of an epithet can be strong evidence that a comment or action is racially motivated, but that "[t]he question in the equal protection context, however, is not just whether the conduct is racially motivated but also whether that action deprives a person of 'equal protection of the laws'... Where the conduct at issue consists solely of speech, there is no equal protection violation." *Id.*

Herein, although Taylor relies upon the legal principles of *Bramer*, the circumstances he faced do not demonstrate those principles. Plaintiff conceded at oral argument that England made one racially offensive remark at the August 6, 2002, meeting, and that there is no evidence of racist comments by England or other members at any other council meetings. England's conduct was unprofessional and reprehensible, but it did not rise to that demonstrated in the *Johnson* case. There was no harassment of Taylor in the sense of repeated comments or degrading behavior. Nor does the Court view the "harassment" in the sense of intimidation by England as sufficient to transform the matter into an equal protection

violation. Taylor has also failed to point to some other conduct accompanying England's offensive outburst that deprived Taylor of established rights. Therefore, Taylor's claim should be dismissed because he has failed to point to evidence of an actionable constitutional violation based upon England's racial slur.

The Court's conclusion in this regard is not swayed by Plaintiff's post-argument filing of supplemental authority. Despite Defendants' protests, the motion to supplement will be granted, as it does not change the outcome on this claim.

Plaintiff's filing directs the court's attention to *Causey v. City of Bay City*, a recent decision by the district court for the Eastern District of Michigan. 353 F. Supp. 2d 864 (E.D. Mich. 2005). Plaintiff argues that the *Causey* court found racial slurs alone to be sufficient evidence of a discriminatory purpose, and submits this Court should similarly hold, thereby allowing him to proceed on his equal protection claim. The Court does not, however, find the district court's decision in *Causey* to be persuasive.

The case is factually distinguishable from the circumstances herein. In *Causey* officers forcibly entered plaintiffs' home without a warrant, handcuffed Causey

while they searched the home during which, according to Causey, they made racial comments and racially specific jokes. Causey also related a series of claimed unwarranted traffic stops, during some of which racial remarks were directed at him. During one of these stops occurring subsequent to the search of his home, Causey alleges the officer purposely locked him out of his vehicle during a rain storm.

Moreover, in addition to the factual distinctions, the district court's discussion of the state of Sixth Circuit law as to racial remarks giving rise to an equal protection claim is disingenuous. The court first notes that isolated racial epithets do not suffice to state a cause of action in employment discrimination cases, then proceeds to hold that racial slurs alone have been sufficient in other contexts, citing the Sixth Circuit's decision in *Smith v. Thornburg*, 136 F.3d 1070 (6th Cir. 1998). The *Causey* court's discussion of *Thornburg* is troubling, in that it erroneously portrays a dissenting opinion by Judge Clay as being the majority's opinion. The majority's opinion in *Thornburg* focused only upon whether there was evidence of a conspiracy to deprive plaintiff of equal protection of the laws, and concluded that the district court correctly

determined evidence of the necessary elements for a conspiracy claim under § 1985(3) had not been shown. *Thornburg*, 136 F.3d at 1078. Thus, despite the recent *Causey* opinion, there is no binding circuit authority that a single racial slur is sufficient to support a claim for an equal protection violation.

C. Claims of Shawn Taylor

1. General Overview

Shawn Taylor presents claims against the City of Falmouth, its Council members, and members of its police department for alleged denial of his constitutional rights in connection with the August 22, 1998, towing of his Chevrolet Blazer from his father's property. Defendants likewise challenged Shawn Taylor's § 1983 claims as being timebarred. However, in response Shawn Taylor argued that his § 1983 claims were not barred because, as a member of the armed services at all relevant times hereto, the timeliness of his claims is protected by the Service Members' Civil Relief Act, 50 U.S.C. App. § 526. Defendants accepted this position in their Reply and now acknowledge that Shawn's claims are not time barred.

In connection with the towing, Shawn alleges Fourteenth Amendment procedural and substantive due process violations, an unlawful Fourth Amendment seizure, selective enforcement violative of equal protection, and a state law conversion claim. Analysis of these claims, based upon the evidence presented by the parties, follows.

2. The City of Falmouth and Defendants in their official capacities did not have a custom or policy of enforcing the nuisance ordinance based upon race, though application of the ordinance without probable cause is in issue

Defendants argue that all § 1983 claims against them in their official capacities should be dismissed because there is no issue as to whether the City of Falmouth had a policy or custom in place which was the moving force behind the alleged constitutional deprivations. Specifically, Defendants offer that there is no evidence the towing of Shawn's vehicle was done pursuant to an unlawful or discriminatory policy or custom of the City.

Shawn Taylor acknowledges that he is not contesting the constitutionality of the nuisance ordinance on its face, but rather as applied to him. He contends that

the record in this case, taken as a whole, has ample evidence of a custom or policy by the City of applying the towing unequally; i.e., based on race. As is more fully discussed in the subsequent analysis of Shawn's selective enforcement claim, there is insufficient proof of a custom or policy of enforcing the nuisance ordinance on an unequal basis to survive summary judgment. On the other hand, as is more fully discussed in the subsequent analysis of Shawn's Fourth Amendment claim, there is sufficient proof raising a question of whether the ordinance was the moving force behind a constitutional deprivation in that it was enforced without probable cause.

3. Council Defendants England, Field, Shields, Clifford, Cross, and Moore are not individually liable for actions associated with the towing of Shawn Taylor's vehicle

Defendants Reis, England, Flaugher, Field, Shields, Clifford, Cross, and Moore submit that they cannot be individually liable for any § 1983 claims being pursued by Shawn Taylor because they had no involvement in the decision to or actual towing of his vehicle. They point out that the only evidence in the record is that Officers Lowery and Sex observed the vehicle while on routine patrol and

made the decision to have it towed as being in violation of the nuisance ordinance. There is no evidence they acted pursuant to a vote of council, or that any council member contacted them individually to request the vehicle be towed.

Shawn argues that each council Defendant did cause the deprivation of his constitutional rights. He notes Chief Reis testified that then council member Flaugher complained to him about the vehicle on Ralph Taylor's property. Plaintiff characterizes Officers Sex and Lowery's actions as carrying out Flaugher's request, and doing so in an arbitrary manner and without adequate notice thus denying him of substantive and procedural due process rights. Shawn argues that when his father appeared at subsequent council meetings to complain and seek return of the vehicle, council members England, Field, Shields, Clifford, Cross and Moore acted as though their hands were tied and did nothing to cure the unlawful deprivation of his property.

A fact issue exists surrounding the initial decision to tow and whether that decision occurred pursuant to a decision of Officer Lowery while on routine patrol, or occurred because council member Flaugher requested of

Chief Reis that it be towed. However, Plaintiff does not dispute that the other council members were not involved in that initial decision. Any actual constitutional deprivation that occurred was by the towing of the vehicle under the ordinance. Failure to remedy this alleged constitutional deprivation when Ralph Taylor appeared at subsequent meetings is not a separate constitutional violation, in particular as to Shawn. Therefore, Plaintiff has failed to show any legal reason why the individual capacity claims against Defendants England, Field, Shields, Clifford, Cross, and Moore should not be dismissed.

4. Shawn Taylor has failed to present sufficient evidence of a discriminatory motive or intent to survive summary judgment on his selective enforcement claim

In addition to Ralph Taylor's equal protection claim based upon Defendant England's comments, Plaintiff Shawn Taylor also asserts an Equal Protection Clause selective enforcement claim, on the theory that the nuisance ordinance was being selectively enforced against black residents of Falmouth. Actually, Plaintiffs' filings on this issue refer to claims by both Ralph and Shawn Taylor.

However, if Ralph Taylor is seeking to advance any such § 1983 claim, it would be time barred.

To demonstrate an equal protection claim based upon selective enforcement, a plaintiff must establish "that someone similarly situated but for the illegitimate classification used by the government actor was treated differently." *Boone v. Spurgess*, 385 F.3d 923, 932 (6th Cir. 2004). Shawn must show that the City, in enforcing the nuisance ordinance by towing his vehicle, distinguished between him and similarly situated individuals based on some bad reason, proving intent, or that the City had no rational reason to distinguish between him and similarly situated persons. *Id.* Successful selective enforcement cases are rare, *Stemler v. City* of *Florence*, 126 F.3d 856, 873 (6th Cir. 1997), as courts defer to the discretion of prosecutors. *United States v. Armstrong*, 517 U.S. 456, 465 (1996). But a prosecutor's discretion is still subject to constitutional constraints. *Id.* at 464. "A defendant may demonstrate that the administration of a[n] [ordinance] is 'directed so exclusively against a particular class of persons...with a mind so unequal and oppressive' that the system of prosecution amounts to 'a practical denial' of

equal protection of the law." *Id.* (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886)).

Defendants argue Shawn Taylor is unable to show the action challenged had a discriminatory effect and was motivated by a discriminatory purpose. *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523 (6th Cir. 2002). "A plaintiff can prove discriminatory effect by showing that the police treated similarly situated individuals of another race differently through statistical evidence or identifying a person of another race who police treated differently." *King v. City* of *Eastpointe*, 86 Fed. Appx. 790, 802 (6th Cir. 2003). Defendants assert Plaintiff cannot point to any evidence that would show the enforcement of the nuisance ordinance had a discriminatory effect on blacks and that City officials enforced the ordinance with a discriminatory purpose in mind.

To support their position, Defendants rely on the fact that although Ralph Taylor has offered general testimony that he feels the towing of Shawn's vehicle was a message from the City to blacks in Falmouth that they "just don't have his [the Mayor's] way," Ralph Taylor was unable to offer any specific examples within a relevant time period. He did not know whether any other black residents

of Falmouth had vehicles towed in 1998, or whether any white residents received warnings or notices. Though Ralph Taylor claims there were other vehicles that should have been towed but were not, he has not identified any specifically. He took photographs in 2003 of other vehicles with expired license plates, but has not provided information as to the race of the owners of these vehicles or specifically why the vehicles depicted in the photos would be considered similarly situated to that of his son's vehicle.

As for evidence of discriminatory purpose through evidence that officials took action because of the adverse effect it would have on an identifiable group, Defendants note that Ralph Taylor relies upon various episodes during his lifetime, apparently to evidence an overall discriminatory attitude by the City against African-Americans.[9] Defendants protest that, with the exception of Councilman England's remarks, none of these incidents

[9] For example, in his deposition Taylor testified he faced discrimination while attending Falmouth High School in the 1950s, was identified in a newspaper article as "Skip Allen, also known as Skip Taylor", had a Pendleton County High School basketball coach call his niece a "black bitch", there was a 1999 or 2000 incident at the high school where a student had a hit list to kill all black students at the school, and most recently that Defendant England called him a black bastard.

have to do with enforcement of the nuisance ordinance, nor were any of the persons involved in these prior incidents directly involved or associated with enforcing this ordinance. And as for England's comments, Defendants argue these occurred some four years after the ordinance was enforced against Taylor, and there is nothing in the record suggesting Donald England was involved in the decision to enforce the nuisance ordinance against Ralph Taylor by towing Shawn Taylor's vehicle.

Plaintiff, in conclusory fashion, notes that the record as a whole provides sufficient proof that genuine issues exist as to his selective enforcement claim. He points out that pictures his father took several years after the towing of cars with expired tags "tend to establish a pattern of discriminatory enforcement of the towing policy in question." Taylor also argues that the fact City Council refused to act to either return the vehicle or pay just compensation for it despite Taylor's repeated requests they do so also evidences the City's discriminatory purpose. The culmination of this inaction, argues Plaintiff, was the racist name-calling and threat directed at Ralph Taylor in August of 2002, and agreed to by the silence of the other council members.

These vague conclusions by Plaintiff of these disconnected events is insufficient to demonstrate selective enforcement. "With regard to the first element, it is an absolute requirement that the plaintiff make at least a prima facie showing that similarly situated persons outside her category were not prosecuted. Furthermore, there is a strong presumption that the state actors have properly discharged their official duties, and to overcome that presumption the plaintiff must present clear evidence to the contrary; 'the standard is a demanding one.'" *Stemler*, 126 F.3d at 873 (citing *Armstrong*, 517 U.S. at 464).

Here, Plaintiff argues that white residents (persons outside their category) who also had expired auto tags (similarly situated) were not prosecuted. However, this assertion is mere conjecture by Plaintiff based only upon photographs taken by his father in 2003, years after the towing in this case. At oral argument Plaintiff conceded that the only event in 1998 he has to support a showing of discriminatory effect is the towing of the Blazer. Counsel offered at argument that Ralph Taylor knows most of the residents of Falmouth and can testify as to the race of the owners of vehicles photographed. Plaintiff submits that the non-towing of vehicles owned by whites in 1998 is inferred

by the fact that older vehicles were still on the streets three and four years later. This inference simply is not strong enough to support a *prima facie* case. Such is not a situation in which evidence has been presented of a definable group of vehicle owners of the same status over ostensively the same time period, yet only a subset of the group was prosecuted. *See United States v. Blackley*, 986 F. Supp. 616, 618 (D.D.C. 1997). Plaintiff points to the fact that this vehicle owned by an African-American was the only vehicle towed at that time under the ordinance and that Defendants in depositions could not identify any other vehicles that were taken. But the fact that the City's use of the ordinance in 1998 to tow Shawn's vehicle was the only documented use is insufficient evidence, since Chief Reis' testimony suggests there were other vehicles that were towed. In addition, though Officer Lowery did not personally know of any other towed vehicles, he testified numerous warnings were written on vehicles and those vehicles were not towed because the problem giving rise to the warning was corrected.

Plaintiff has failed to point to any evidence that City officials chose to prosecute them "at least in part 'because of', not merely 'in spite of' its adverse effects upon an

identifiable group." *City* of *Eastpointe*, 86 Fed. Appx. at 802. Though *City* of *Eastpointe* also says this proof of discriminatory purpose may be inferred from the totality of the circumstances, *id.*, Plaintiff's efforts to do so in this case fail. The previous life events identified by Ralph Taylor in his deposition are too remote in time and disconnected from the 1998 towing of a vehicle owned by his son. Plaintiff at oral argument acknowledged that proving Defendants' actions were motivated by a discriminatory purpose is problematic as he has evidence of no events in 1998 other than the towing. But he argues there were his father's repeated requests to council, the racial harassment incident in August of 2002, and the constitutional liability of the other Defendants for their inaction and toleration of the outburst. While Plaintiff *argues* that council's continued rejection of his father's request at council meetings is after-the-fact evidence of discriminatory purpose in selectively enforcing the ordinance, there is no evidence connecting council's refusals to satisfy Ralph Taylor's demands with his race. Indeed, while Ralph Taylor testified that towing Shawn's vehicle was a message to blacks in Falmouth that they "don't have [the Mayor's] way" and that "these people"

(referring to city officials), go out of their way to "step on me and mine", he also testified there are white residents that the city officials step on as well, "the ones who just don't dance to their tune." (R. Taylor deposition, p. 106) And as far as council member England's inappropriate comments being the culmination and outward demonstration of the City's overall racist attitude, as Plaintiff characterizes it, it is more accurate to describe it as an unprofessional outburst of a single council member who was not directly involved in the original citation and towing. Finally, the asserted constitutional violation by other council members through their inaction at England's outburst has been previously addressed herein and likewise does not support an inference of discriminatory purpose in enforcing the nuisance ordinance.

5. Shawn Taylor has failed to present sufficient evidence of any arbitrary and capricious action sufficient to create a jury issue on his substantive due process claim

The Fourteenth Amendment provides that no state shall deprive any person of property without due process of law. U.S. Const. Amend. XIV. There are both procedural and substantive components to due process. "[T]he substantive component of the due process clause imposes

certain limitations on governmental deprivations of life, liberty, or property, independent of the procedural limitations imposed on such deprivations by procedural due process." *Klimik v. Kent Co. Sheriff's Dep't*, 91 Fed. Appx. 396, 403 (6th Cir. 2004). Substantive due process protects individuals against the arbitrary and oppressive exercise of government power. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). To establish a substantive due process violation, plaintiff must show the governmental entity acted with the requisite culpability. *Ewolski v. City* of *Brunswick*, 287 F.3d 492, 510 (6th Cir. 2002). Executive action of government officials violates substantive due process "only when it can properly be characterized as arbitrary, or conscious shocking, in a constitutional sense." *Klimik*, 91 Fed. Appx. at 404 (quoting *County of Sacramento*, 523 U.S. at 847). "'[O]nly the most egregious official conduct' violates substantive due process under this standard." *Id.* (quoting *County of Sacramento*, 523 U.S. at 846).

Plaintiff has failed to establish a substantive due process claim. The enforcement of the ordinance by Officers Lowery and Bex by towing Shawn Taylor's vehicle does not "shock the conscience" nor were their

actions in doing so "most egregious." The shock the conscious standard ranges from more than mere negligence on one end to conduct that intends to injure at the other end. *Ewolski*, 287 F.3d at 510. Shawn argues the City's handling of the matter was arbitrary and shocked the conscience because his vehicle was towed despite express representations that it would not be towed and contrary to the nuisance policy itself. Plaintiff seems to equate arbitrariness with an erroneous determination that the ordinance has been violated. Such a determination may give rise to a Fourth Amendment or procedural due process claim, but is not the type of arbitrary and oppressive exercise of government power encompassed with substantive due process. Therefore, summary judgment in Defendants' favor on this claim is appropriate.

6. The City of Falmouth failed to provide constitutionally adequate procedural due process in conjunction with the towing

Both Plaintiff and Defendants move for summary judgment on this claim.

"Nothing in the [Fourteenth] Amendment protects against all deprivations of life, liberty, or property by the State. The Fourteenth Amendment protects only against

deprivations without due process of law." *Parratt v. Taylor*, 451 U.S. 527, 537 (1981). The question is what process is due. Procedural due process requires that Shawn Taylor have had, at a meaningful time and in a meaningful manner, an opportunity to challenge the seizure of his property. *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976).

Defendants acknowledge and accept this standard. Defendants argue that Shawn Taylor was given "an abundance of notice" that his vehicle was in violation of the nuisance ordinance and at risk of being towed, evidenced by the fact that two warnings were placed on the vehicle that it was in violation and would be towed in seven days if not removed. Defendants point out that Ralph Taylor acknowledges that warnings were given, though they may not have been written; that the warnings were at least sufficient to prompt Ralph Taylor to respond by calling the City to try and persuade them not to tow the Suburban; and that Ralph Taylor continued to do nothing to abate the nuisance.

Plaintiff argues there is no evidence that any constitutionally sufficient written notices were issued because they were not produced in discovery. Defendants' offered explanation at oral argument was that they were

likely lost among those records moved to temporary locations during cleanup when the City of Falmouth was flooded in 1997. Due process standards require "oral or written notice of charges against him, an explanation of the...evidence..." *Duchesne v. Williams*, 849 F.2d 1004, 1007 (6th Cir. 1988). Plaintiff argues neither Shawn nor Ralph Taylor were ever provided with this type of notice, best evidenced by the fact that Ralph Taylor thought he had complied with whatever problem the City had with the vehicle by turning it around so the expired tags were not visible, as he was directed to do by Chief Reis.

While Defendants acknowledge that notice and opportunity are required, their efforts to establish such are inadequate. The ordinance itself contains no provisions directed to notice or opportunity to be heard, pre- or post-tow, for the owner of a vehicle seized pursuant to the ordinance. The notice requirement may arguably have been satisfied by the fact Ralph Taylor acknowledged he was aware that the vehicle was a problem. In *Towers v. City of Chicago*, 979 F. Supp. 708 (ND. Ill. 1997) the court noted that in implementing an ordinance allowing seizure of vehicles, the City was not obligated to locate and notify every registered owner, but simply to use procedures

"reasonably calculated" to notify the owner. *Id.* at 715. The court concluded that a ticketing officer giving notice to the person in control of the vehicle was sufficient. *Id.*

However, even assuming notice to Ralph Taylor that Shawn's vehicle was a potential nuisance subject to being towed was sufficient, an opportunity for Shawn to be heard was not. The ordinance contains no procedural mechanism, before or after towing, for the owner to be heard. Nor does the citation issued to Ralph Taylor that provides for a court date over two weeks later comply with an adequate opportunity to be heard, as offered by Defendants at oral argument. *See, e.g., Stypmann v. City and County of San Francisco*, 557 F.2d 1338 (9th Cir. 1977)(removal from streets without prior notice was inadequate due process, nor was post-tow hearing to be held within 5 days considered "prompt" when owner is deprived of vehicle); *Kutschbach v. Davies*, 885 F. Supp. 1079 (S.D. Ohio 1995)(notice and opportunity to regain possession of seized auto inadequate); *Petty v. Board of County Commissioners*, 957 F. Supp. 1207 (D. Kansas 1997)(lack of pre-tow notice/hearing might violate due process if unregistered, unlicensed, abandoned vehicle towed from private property and no post-deprivation

protections were provided); *Sutton v. City of Milwaukee*, 672 F.2d 644 (7th Cir. 1982)(due process did not require prior hearing before towing of abandoned and illegally parked cars, including in nonemergency situations); *Kness v. City of Kenosha, Wisconsin*, 669 F. Supp. 1484 (E.D. Wis. 1987)(denial to owner of pre-tow hearing before vehicles were towed from his property property under nuisance ordinance violated due process); and *Propert v. District of Columbia*, 948 F.2d 1327 (D.D.C. 1991)(some type of notice and opportunity to be heard required by due process before vehicles identified as "junk" can be towed and destroyed).

All of these cases require at least some type of prompt opportunity for the owner to present his side; "the amount of process required can never be reduced to zero." *Propert*, 948 F.2d at 1332. In this case, Shawn Taylor was not afforded a meaningful opportunity to be heard. It is not provided for within the actual ordinance, nor by way of any formal policy of the City in enforcing the ordinance against owners of automobiles whose vehicles violate the City's nuisance ordinance.

Defendants further offer that Shawn has an adequate state law tort remedy for any alleged deprivation

of his property interest, and so under *Parratt v. Taylor*, 451 U.S. 527 (1981) his constitutional procedural due process claim should be dismissed. *Parratt* does provide that where a random and unauthorized act by a municipal employee results in a tortious taking of private property, due process is satisfied if state tort law provides a meaningful post-deprivation remedy. *Parratt*, 451 U.S. at 541. But as Plaintiff notes, the seizure of Shawn's vehicle was not a random and unauthorized act by a City employee. Defendant Flaugher and others testified that since 1991 the City's policy with respect to enforcement of the ordinance has been that a vehicle with expired plates is considered "inoperable." Thus, as Plaintiff argues, the Blazer was towed not as a random, unauthorized act of a city employee, but in furtherance of the City's policy, and therefore *Parratt* does not apply.

In summary, Defendants' request for summary judgment on this claim is denied, and Plaintiffs request for summary judgment is granted. Though Ralph Taylor may have been given notice, it is questionable whether that notice was effective as to Shawn Taylor and, even if it were, no meaningful opportunity to be heard was afforded to Shawn Taylor, the property owner.

7. A factual issue exists as to whether Officer Lowery acted with probable cause in seizing Shawn Taylor's vehicle

The Fourth Amendment protects an individual from unreasonable seizures of his property. A seizure of property occurs when there is some "meaningful interference with an individual's possessory interests in that property." *Soldal v. Cook County*, 506 U.S. 56, 63 (1992).

Defendants argue Shawn Taylor's § 1983 claim against them for asserted violation of his Fourth Amendment right must also be dismissed because the officers had probable cause to seize the vehicle. In support, Defendants argue that Fourth Amendment jurisprudence dictates that a seizure of property is deemed reasonable when carried out in accordance with procedural due process standards. *Mitchell v. City* of *Cleveland*, 172 F.3d 49, 1998 WL 898872 (6th Cir.)(unpublished table decision). "As long as procedural due process standards are met and no unreasonable municipal actions are shown, a nuisance abatement action does not violate the Fourth Amendment." *Santana v. City of Tulsa*, 359 F.3d 1241, 1245 (10th Cir. 2004)(no Fourth Amendment violation in entering private premises without a warrant and removing and discarding a nuisance in the form of used computer parts where plaintiff

given notice and opportunity to respond to original citation). Defendants offer that the public interest in cleaning up the debris from the flood was a significant one, compared with the minimal invasion of Defendant's privacy interest in a vehicle stored in the open on property which was not the owner's primary residence.

Plaintiff counters that the seizure of his vehicle was not reasonable under the circumstances. Plaintiff submits this question is best answered by a jury. Plaintiff challenges the claim that Officers Lowery and Sex had probable cause to believe seizing the vehicle was reasonable as being in violation of the City's nuisance ordinance. Plaintiff argues the officers failed to ascertain whether the car was "inoperable" or "unfit for further use" as provided for in the ordinance. Plaintiff distinguishes Defendants' cases as all being cases where the fact that a nuisance was present was not challenged. And, concludes Plaintiff, even if there was probable cause to believe the ordinance had been violated, seizure pursuant to an abatement law is only appropriate where due process is afforded, a point which Defendants concede but cannot evidence.

Plaintiff's argument on this claim is sound. As noted above, procedural due process is lacking. In *Roberts*

v. City of *Geneva*, 114 F. Supp. 2d 1199 (M.D. Ala. 2000) the court concluded plaintiff's Fourth Amendment rights were not violated when officers seized a vehicle reasonably believed to be in violation of the junked or abandoned ordinance. *Id.* at 1208-09. The court noted the vehicle was in clear view from the road and could be observed by officers, who reasonably believed it to be violative of the ordinance. In the present case Shawn Taylor's vehicle was also in clear view and observable from the public road. However, probable cause to believe the vehicle constituted a nuisance in violation of the ordinance is more questionable than in *Roberts*. Here, the ordinance permitted the towing of "inoperable" vehicles upon notice or warning. One might conclude that Shawn's vehicle was inoperable because it had physical damage and had been in the same location awhile, with expired tags. However, under the ordinance "inoperative condition" is defined as "unable to move under its own power due to defective or missing parts" (Ord. 93.03A1994, sec. 2) and "unfit for further use" is defined as "in a dangerous condition; having defective or missing parts; or in such a condition generally as to be unfit for further use as a conveyance" (*id.*). These definitions appear to be directed to the physical condition

of the vehicle, rather than the tag or insurance status of the vehicle, while the law enforcement Defendants testified that they considered the tag or insurance status as also rendering a vehicle inoperable. There are also questions surrounding the notice or warning provided prior to towing. Officer Lowery testified a vehicle owner was given seven days to correct any problem with the vehicle after receiving a citation notice.[10] Lowery testified the determination to tow the vehicle was based, in part, on the observation that a warning had already been given. Plaintiff submits there are disputed issues of fact as to the content of the crumpled citations found near his vehicle, the recipient of those notices and date of issuance.

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[10] Though this may be Lowery's testimony, no such language is contained with the Ordinance itself. The Ordinance says the City Clerk-Treasurer of Public Works shall give 5 days' written notice to remedy the nuisance, sent by mail to the last known address of the owner of the [real] property. If the notice is not heeded, "the Mayor is authorized to send employees or agents upon the property to remedy the situation. Further the Mayor or another person designated by the Council by majority vote may be authorized to bring a criminal action against the appropriate person, in the appropriate court, for violation of Section 8 hereof [violation of any provision of this ordinance)." Section 5(B).

Given these circumstances, the Court concludes that questions exist on Plaintiff's Fourth Amendment claim that should be left for the jury's consideration. Therefore, Defendants' request for summary judgment on this claim will be denied.

8. Officer Lowery is not qualifiedly immune for his actions in seizing the vehicle

Defendant Lowery submits that he is entitled to summary judgment as to any claims against him on the basis of qualified immunity. In support, he points out that Plaintiff does not challenge the constitutionality of the ordinance itself, that he was enforcing a presumptively valid ordinance, and that he had probable cause to believe the ordinance had been violated after observing the older model vehicle with wrecked front end and expired tags with the two crumpled prior notices next to it. He contends that these circumstances would justify a reasonable person's belief that Plaintiff had violated the City's ordinance, and so he is entitled to qualified immunity with respect to the decision to tow the vehicle.

Officer Lowery is not, however, afforded qualified immunity in this situation. To defeat qualified immunity, Plaintiff must show that a constitutional right was violated,

and that the right was clearly established (did a reasonable officer have fair warning that the acts he performed were unlawful). *Jackson v. Leighton*, 168 F.3d 903, 909 (6th Cir. 1999). Plaintiff had a constitutional right not to have his property seized without probable cause, which right was clearly established at the time of the 1998 towing. As discussed above, questions exist as to whether Officer Lowery acted with probable cause; therefore, summary judgment in Officer Lowery's favor based upon qualified immunity will be denied.

9. Questions of fact exist which prevent summary judgment on Plaintiff's conversion claim

Defendants and Plaintiff both seek summary judgment on Plaintiff's state law claim for conversion. However, summary judgment in neither side's favor is warranted.

Kentucky law provides that

> [c]onversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein, such as a tortious taking of another's chattels, or any wrongful exercise or assumption of authority, personally or by procurement, over another's goods,

> depriving him of the possession, permanently or for an indefinite time.

Illinois Cent. R. Co. v. Fontaine, 289 S.W. 263, 267 (Ky. 1926); *also* see *State Automobile Mut. Ins. Co. v. Chrysler Credit Corp.*, 792 S.W.2d 626, 627 (Ky. Ct. App. 1990).

Whether Defendants wrongfully exerted dominion over Shawn Taylor's vehicle is a question best left for the jury, and parallels the jury's consideration of Plaintiff's Fourth Amendment claim. The Court is not persuaded by Defendants' argument that the proper party for Plaintiff to sue is Top Shop Garage, the entity which actually destroyed Plaintiffs property. The initial exercise of dominion and control over the vehicle was effectuated by Defendants; they are not excused from potential legal liability for their actions simply by transferring possession to an agent acting at their request.

D. Conspiracy Claim Under 42 U.S.C. § 1985(3)

Defendants offer that Plaintiffs' conspiracy claim against the Defendants in their official capacities must fail, because it would essentially amount to a charge that the City conspired with itself. This, argues Defendants, is due to application of the intracorporate conspiracy doctrine,

which makes it legally impossible for a municipality as a legal entity to conspire, through the acts of its agents, with itself. Plaintiffs do not challenge this argument. Therefore, any conspiracy claim pursuant to § 1985(3) against Defendants in their official capacities should be dismissed.

A claim of conspiracy against Defendants in their individual capacities under § 1985(3) requires proof of (1) a conspiracy of two or more persons (motivated by a class-based animus); (2) with the purpose to directly or indirectly deprive a person or class of persons of equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) which causes injury to the person or property of plaintiff or deprivation of any right or privilege of a citizen. *Smith v. Thornburg*, 136 F.3d 1070, 1078 (6th Cir. 1998). Defendants argue there is no evidence in this post-discovery record of any such conspiracy or scheme to deprive Plaintiffs of their constitutional rights, of any acts in furtherance of this scheme, or any class-based animus motivating them.

Plaintiffs counter that necessary proof of all elements is in the record. They note that Defendants knew for years that Ralph Taylor objected to the towing of his son's vehicle and demanded compensation for its loss. The

race-based animus for the towing is evidenced by Ralph Taylor's proof (via affidavit) that similar condition parked vehicles owned by white residents were not towed, and is evidenced by the name-calling that was tacitly ratified by the other council members. The loss of the vehicle without compensation and the emotional distress from the racist name-calling are the injuries Plaintiffs allege were caused by the conspiracy.

The Court finds Plaintiffs' proof to be insufficient to state a *prima facie* case of conspiracy against Defendants in their individual capacities. Plaintiffs have failed to evidence a genuine issue exists as to any of the necessary elements of such a claim. Similar to *Smith v. Thornburg*, there is a total lack of any evidence of a *conspiracy* in this case to deprive Plaintiffs of their constitutional rights. At this summary judgment stage, Plaintiffs have failed to come forth with evidence of specific facts, rather than relying upon what is in their pleadings generally, "coupled with the hope that something can be developed at trial." *Ghandi v. Police Dep't of the City of Detroit*, 747 F.2d 338, 345 (6th Cir. 1984).

E. Punitive Damages

Defendants seek dismissal of Plaintiffs' punitive damage claim against the City and against the Defendants in their official capacities. Defendants submit it is well-established that punitive damages are not recoverable in such contexts.

Plaintiffs acknowledge punitive damages cannot be sought from the City for § 1983 claims. Plaintiffs submit, though, that punitive damages are legally available to be sought against Defendants in their individual capacities, and that Kentucky law allows for recovery of punitive damages where there is evidence of oppression, fraud, malice, or gross negligence by defendants acting in wanton or reckless disregard for the lives, safety, and property of others.

Punitive damages may not be assessed against a municipality under § 1983, but they may be awarded against its officials in their individual capacity. *Wagner v. City* of *Memphis*, 971 F. Supp. 308, 322 (W.D. Tenn. 1997). Punitive damages are designed to punish and deter officials who have engaged in egregious wrongdoing and may be assessed in a § 1983 action "when the defendant's conduct is shown to be motivated by evil motive or intent,

or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). They may be awarded when it is shown that defendant has trampled on plaintiffs rights by evidence defendant has engaged in plainly wrongful conduct. *Wagner*, 971 F. Supp. at 322.

The decision to award punitive damages is discretionary. There is, of course, no punitive damage claim available to Ralph Taylor, as all of his claims have been dismissed. As for Shawn Taylor, his procedural due process, Fourth Amendment, and conversion claims survive. Though an award of punitive damages against any of the Defendants in their individual capacity as to these claims seems doubtful, the Court will defer any ruling on this claim pending presentation of Plaintiff's evidence at trial.

III. Conclusion

For the reasons set forth above, **IT IS ORDERED** that:

(1) That all claims asserted against Defendant Luke Sex are hereby **DISMISSED, WITHOUT PREJUDICE,** for lack of service of process.

(2) Plaintiffs' Motion for Leave to File Supplemental Authority (Doc. #48) is hereby **GRANTED**.

(3) Plaintiffs' Motion for Summary Judgment (Doc. #17) is hereby **GRANTED IN PART** and **DENIED IN PART**. Plaintiff Shawn Taylor is hereby **GRANTED** summary judgment in his favor on his procedural due process claim. Plaintiffs' Motion is hereby **DENIED** in all other respects.

(4) Defendants' Motion for Summary Judgment (Doc. #18) is hereby **GRANTED IN PART** and **DENIED IN PART**. Defendants are hereby **DENIED** summary judgment on the procedural due process, Fourth Amendment claim, qualified immunity claim, state law conversion claim, and punitive damage claim of Plaintiff Shawn Taylor. Defendants are hereby **GRANTED** summary judgment in all respects.

This 9th day of March, 2005.

Signed By:

/s/ David L. Bunning **(DB)**
United States District Judge

(2)

No. 06-1036

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In The
Supreme Court of the United States

RALPH TAYLOR,

Petitioner,

v.

CITY OF FALMOUTH, KENTUCKY,
and DONALD ENGLAND,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

(1) Whether the Sixth Circuit correctly interpreted and applied the "person of ordinary firmness" standard in upholding a district court's decision granting summary judgment to the City of Falmouth and Councilmember Donald England on Petitioner's First Amendment retaliation claim?

(2) In holding that speech cannot form the basis for an Equal Protection Clause claim in the absence of "harassment or other conduct," did the Sixth Circuit correctly apply the law as set forth in Village of *Arlington Heights v. Met. Hous. Dev. Corp.*, 429 U.S. 252 (1977)?

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COUNTERSTATEMENT OF THE CASE

On August 22, 1998, pursuant to the City of Falmouth's nuisance ordinance, two City police officers towed what they believed was an abandoned vehicle from Petitioner's property. The vehicle in question was owned by Petitioner's adult son, Shawn Taylor.

Over the next five years, Petitioner appeared sporadically at City Council meetings to complain about the towing of his son's vehicle.[1] Specifically, Petitioner appeared at Council meetings on December 29, 1998 and June 8, 1999, demanding on both occasions that the vehicle be returned to him. (R. 19 Defendants' MSJ at Ex. 3 and 4, Apx. pp. 113-119) Each time, City Council referred Petitioner to then-Police Chief Greg Reis for resolution of the matter. (R. 19 Defendants' MSJ at Ex. 3 and 4, Apx. pp. 113-119) Chief Reis, who happened to be present at the June 8, 1999, meeting, offered to meet with Petitioner the next morning to look into the matter. However, Petitioner did not follow up with Chief Reis on either occasion because he had spoken to Chief Reis once in August 1998 and apparently doubted Reis' ability to locate the vehicle. (R. 44 R. Taylor at TR 76-77, 79, Apx. pp. 212-213, 215)

For 18 months, Petitioner made no further inquiries about the vehicle. Then, on January 2, 2002, he again appeared before City Council and requested the return of the vehicle. (R. 19 Defendants' MSJ at Ex. 5, Apx. pp.

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[1] Shawn Taylor himself never responded to the towing and never made any inquiries on his own behalf about the vehicle until the instant action was filed with the district court. Shawn Taylor's Fourteenth Amendment procedural due process claim against the City and the police officers who ordered the towing – the only claim asserted by either of the plaintiffs that survived summary judgment – settled.

120-125) By this time, Petitioner already knew that the vehicle had been crushed, information that he did not share with the City when making his demand for the return of the vehicle.[2] (R. 44 R. Taylor at TR 81) In addition, most of the persons who comprised City Council on January 2, 2002 were not Councilmembers on June 8, 1999, the last time Petitioner addressed Council about the towing. (R. 46 T. England at TR 24, Apx. p. 261) Thus, Council was not prepared to address Petitioner's inquiries, but requested that then-Mayor Flaugher investigate and report on the matter at the next regularly scheduled Council meeting on February 5, 2002. (R. 19 Defendants' MSJ at Ex. 5, Apx. pp. 120-125)

Although Petitioner did not appear at the February 5, 2002 Council meeting, City Clerk Terry England reported that the vehicle had been towed in 1998 under the City's nuisance ordinance; that it had been taken to Top Shop Garage; that the garage was no longer in business; and that the vehicle could not be located. (R. 19 Defendants' MSJ at Ex. 6, Apx. pp. 126-130)

Six months later, on August 6, 2002, Petitioner again appeared at a Council meeting, demanding the return of "his"[3] vehicle. (R. 19 Defendants' MSJ at Ex. 7, Apx. pp. 131-134) From the start, Petitioner was extremely confrontational with City Clerk Terry England, whom he accused of hiding the vehicle. (R. 19 Defendants' MSJ at Ex. 7, Apx. pp. 131-134; R. 46 C. Clifford at TR 16, Apx. p.

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[2] Petitioner testified that he talked with the owner of Top Shop Garage in 1999 and was told at that time that the vehicle had been crushed. (R. 44 R. Taylor at TR 72, Apx. p. 210)

[3] Again, the vehicle belonged to his adult son, another fact Petitioner withheld from Falmouth City Council.

257; R. 46 T. England at TR 25, Apx. p. 261) The discussion between Petitioner and Terry England became heated and was loud enough that it interfered with the progression of Council's agenda. (R. 46 M. Shields at TR 25-26, Apx. pp. 254-255; R. 46 T. England at TR 27-28, Apx. p. 262; R. 46 D. Cross at TR 15-16, Apx. p. 258)

Councilmember Donald England (Terry England's father) told Petitioner and Terry England to be quiet so City Council could focus on its business. (R. 19 Defendants' MSJ at Ex. 7, Apx. pp. 131-134; R. 46 M. Shields at TR 26, Apx. p. 255; R. 46 T. England at TR 28, Apx. p. 262; R. 46 D. England at TR 38-39, Apx. p. 243) In response, Petitioner approached Councilmember England and said, "I'm not afraid of you." (R. 19 Defendants' MSJ at Ex. 7, Apx. pp. 131-134; R. 46 D. England at TR 38-39, Apx. p. 243; R. 46 T. England at TR 28, Apx. p. 262) Councilmember England then called Petitioner a "black bastard" and invited him to "step outside." (R. 19 Defendants' MSJ at Ex. 7, Apx. pp. 131-134; R. 44 R. Taylor at TR 92, Apx. p. 224; R. 46 C. Clifford at TR 16, Apx. p. 257; R. 46 M. Shields at TR 27, Apx. p. 255; R. 46 T. England at TR 28, Apx. p. 262; R. 46 D. England at TR 36, Apx. p. 242) The rest of Council audibly gasped in disbelief when England made the remark.[4] (R. 44 R. Taylor at TR 95, Apx. p. 227)

After making the remark, Donald England went outside. A police officer who regularly attended City Council meetings and a councilmember followed and detained *England*, a measure Petitioner acknowledges was intended

[4] In his deposition, Petitioner characterized the reaction to England's comment as nervous laughter, "like, you know, like one little kid does something, all the kids does, oh, that's all I heard." (R. 44 R. Taylor at TR 95, Apx. p. 227)

to make sure there would be no physical confrontation outside. (R. 44 R. Taylor at TR 93-94, 98, Apx. pp. 225-226, 230) Petitioner stayed to finish addressing the remaining members of Council. He told Council he would come back the following month to discuss his vehicle again. (R. 44 R. Taylor at TR 93-94, Apx. pp. 225-226)

Having finished addressing City Council, Petitioner left the meeting. Donald England, who was then outside, was being detained by a police officer and one of his fellow Councilmembers to calm him down and to ensure that no physical confrontation ensued between England and Petitioner. (R. 44 R. Taylor at TR 93-94, 98, Apx. pp. 225-226, 230) Petitioner attempted to walk in England's direction, purportedly because that was the way to his home. However, to prevent any interaction between England and Petitioner, a police officer told Petitioner he could not walk in that direction. Rather than taking another route home, Petitioner remained at the scene for approximately 30-45 minutes, during which time he now claims he was being "detained."

Notwithstanding England's remark, the City Attorney who was present at the August 6, 2002 Council meeting encouraged Petitioner to submit a claim for compensation for the vehicle that had been towed. (R. 44 R. Taylor at TR 78-79, Apx. pp. 214-215) City Council also directed its City Clerk and City Attorney to investigate Petitioner's allegation about the towing of the vehicle. (R. 19 Defendants' MSJ at Ex. 8, Apx. pp. 135-139) Indeed, City Council placed Petitioner on the agenda for its September 3, 2002, meeting, and the City Attorney reported the results of his investigation at that time. (R. 19 Defendants' MSJ at Ex. 1, Apx. pp. 107-111).

Having investigated the matter, the City Attorney reported that Shawn Taylor, not Petitioner, owned the vehicle and that the claim had to be resolved with the vehicle's owner. (R. 19 Defendants' MSJ, Apx. pp. 76-106). Not having heard from Shawn Taylor, the actual owner of the vehicle, City Council took no further action.

PROCEEDINGS BELOW

On July 1, 2003, Petitioner filed a Complaint against the City of Falmouth, Mayor Gene Flaugher, the two police officers who had directed the towing of the vehicle,[5] and Councilmembers, Donald England, Janet Field, Mary Ann Shields, Clay Clifford, Don Cross and Virgil Moore, all in their individual and official capacities (collectively "Falmouth Defendants"), alleging, pursuant to 42 U.S.C. § 1983, that Falmouth Defendants had violated his and Shawn Taylor's constitutional rights.

Shawn Taylor asserted multiple causes of action under the Fourth and Fourteenth Amendments in connection with the towing of his vehicle. (R. 1 Complaint, Apx. pp. 20-30) The District Court granted summary judgment in Shawn Taylor's favor on his Fourteenth Amendment procedural due process claim, but granted summary judgment to Falmouth Defendants on all of

[5] Petitioner's reference to having sued "several police officials" in paragraph 6 of his "Statement of the Case," followed in quick succession by his reference to a "police detention" in the next paragraph improperly suggests that he asserted a Fourth Amendment claim against the officers who allegedly detained him. He did not. The only police officers named as defendants in Petitioner's Complaint were the two who towed Shawn Taylor's vehicle. Petitioner asserted no claim against them.

Shawn Taylor's other claims. (R. 52 Opinion at 1-23, Apx. pp. 31-53) The parties settled Shawn Taylor's procedural due process claim and Shawn Taylor never appealed the remainder of the District Court's decision.

Petitioner asserted claims premised on both the towing and the incident in which Donald England called him a "black bastard." (R. 1 Complaint, Apx. pp. 20-30) When Falmouth Defendants challenged his standing to raise claims based on the towing and asserted a statute of limitations defense to those claims, Petitioner abandoned all claims premised on the towing and sought to recover solely for England's "black bastard" remark. (R. 19 Defendants' Memorandum in Support of MSJ at 6-8, Apx. pp. 81-83; R. 27 Plaintiffs' Response to Defendants' MSJ at 6, Apx. p. 147) Thus, Petitioner alleged that England violated his right to equal protection and retaliated against him for exercising his First Amendment rights by calling him a "black bastard." In addition, Petitioner alleged that Flaugher, Field, Shields, Clifford, Cross and Moore ("Council Defendants") were liable in their individual capacities for failing to rebuke England after that comment. Finally, Petitioner sought to impose liability on the City of Falmouth in connection with England's remark and the elected officials' alleged lack of response to that remark.

In a thorough and well-reasoned opinion, the District Court granted summary judgment to the City, Councilmember England and the Council Defendants on all of Petitioner's claims. Petitioner appealed that decision to the Sixth Circuit Court of Appeals, and the Sixth Circuit, in an equally sound and well-reasoned opinion, affirmed the District Court's decision.

By way of the instant Petition, Petitioner seeks review of the Sixth Circuit's decision with respect to his First Amendment retaliation and equal protection claims against Councilmember England. In addition, having identified the City of Falmouth as a party to this proceeding, Petitioner apparently seeks review in this forum of the Sixth Circuit's decision with respect to his municipal liability claim.

REASONS FOR DENYING THE PETITION

I. THE PETITION CONTAINS MISLEADING STATEMENTS ABOUT THE FACTS OF THE INCIDENT ON WHICH PETITIONER'S CLAIMS WERE PREMISED

Before getting to the heart of this Response, it is necessary to clarify several misleading statements and/or inaccurate implications contained in the Petition.

First, Petitioner contends that "the City's legislative body itself engage[d] in the racially intimidating conduct" and repeatedly imputes England's comments to the City Council as a whole. (Petition, pp. 7, 19, 25-30, FN 6 and 7) That is wholly unsupported by any evidence in the record. The only person who uttered a racially insensitive or intimidating comment is Donald England. It is elementary that a legislative body speaks *not* through the voice of a single legislator, but *only* by majority vote. Any other arrangement would require a vote on every sentiment ever expressed by a councilmember, lest one councilmember's diatribe be subsequently construed as the opinion of "the legislative body itself." As such, the legislative body itself did not engage in racially intimidating conduct.

Second, Petitioner states: "Mr. England then walked outside, accompanied by an armed officer, for the purpose of making good on his threat." (Petition, pp. 6-7) As written, this statement could be read to unfairly infer that the "armed guard"[6] was brought along to reinforce England's threat. However, as Petitioner plainly acknowledges, a police officer and another councilmember each on their own initiative, followed England outside in order to ensure that England *did not* fight with Petitioner. (R. 44 R. Taylor at TR 93-98, Apx. pp. 225-230)

Third, Petitioner asserts that Falmouth City Council "rejected" his complaints about the towing of his son's vehicle and that the rejection was "racist." (Petition, p. 7) This assertion is completely unfounded. For one thing, Council did not "reject" Petitioner's complaints. To the contrary, the City Attorney suggested that Petitioner submit a claim to the City's insurance carrier, a suggestion Petitioner concedes he simply ignored. (R. 44 R. Taylor at TR 78-79, Apx. pp. 214-215) In addition, Council directed then-Mayor Flaugher and the City Clerk to investigate the circumstances of the towing and the whereabouts of the vehicle and to report back at the next regularly scheduled meeting of Falmouth City Council. The City Attorney, in addressing his client, the City, rendered legal opinions concerning Petitioner's standing to contest the towing and the expiration of the statute of limitations. There was no evidence that these legal conclusions, which were unchallenged, were racist or that Council's reliance thereon was motivated by racial prejudice.

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[6] The Sergeant-At-Arms of Ci , Council, who was also a police officer for the City of Falmouth, is the "armed guard" to whom Taylor refers. (R. 44 R. Taylor at TR 95, Apx. p. 227)

Petitioner has never produced any evidence that Falmouth City Council *as a whole* treated him any differently than it treated others, or that any difference in treatment was the result of Petitioner's race. To the contrary, just as it had done for other citizens in the past, Falmouth City Council gave Petitioner permission to address Council on a matter that was not on the agenda. (R. 46 V. Moore at TR 13-14, Apx. pp. 263-264; R. 46 Gene Flaugher at TR 60, Apx. p. 251; R. 46 T. England at TR 19-21, Apx. p. 260) In addition, Falmouth City Council responded to Petitioner's complaint the same way it responded to complaints from other citizens, i.e., by directing the Mayor to investigate and report back to Council. (R. 46 D. Cross at TR 23-24, Apx. p. 259; R. 46 D. England at TR 26-27, Apx. p. 241)

Finally, since the fact that England threatened him did not convince the District Court that he had a viable equal protection claim, Petitioner shifted the focus of his argument on appeal and in this Petition. Specifically, Petitioner now insinuates that he was "detained" by officers outside of the City building following his verbal exchange with England and that the detention constitutes "harassment," such that he has a viable Equal Protection claim.[7] There are two problems with this insinuation. First, while case law suggests that "harassment or other conduct" might be sufficient to state a viable equal protection claim, it certainly does not stand for the proposition that *any* inconvenience or perceived harassment – no

[7] Petitioner's Complaint did not assert a Fourth Amendment violation based on this detention, nor did he argue in any of his briefs at the trial court level that the detention constituted "harassment" sufficient to support his equal protection claim.

matter how *de minimis* – supports an equal protection claim. Second, there is no support for Petitioner's contention that he was "unlawfully" detained. Everyone agrees that Petitioner initiated a discussion that led to "a hot and heated night" in Falmouth City Council chambers[8], that England asked Petitioner to "step outside," and that Petitioner construed that as a threat to his personal safety. (R. 44 R. Taylor at TR 78, Apx. p. 214) Everyone also agrees that police officers and a councilmember followed the two outside, separated them to prevent any physical confrontation and to protect Petitioner, and told them "there wasn't going to be no fighting on this sidewalk." (R. 44 R. Taylor at TR 93-96, 98, Apx. pp. 225-228, 230) According to Petitioner, both he *and England* were detained, though separately. (R. 44 R. Taylor at TR 94, Apx. p. 226) While Petitioner apparently disagrees with the way the situation was handled, he has offered no legal authority to suggest that it was unreasonable as a matter of law to handle the situation as the police officers did. As such, Petitioner's assertion that he was "unlawfully" detained is without merit. More importantly, however, that assertion simply does not support his Equal Protection claim.[9]

As the courts below both correctly noted, the conduct that Petitioner relies upon to establish his claims consists

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[8] While Petitioner denies it was his fault things got heated, by his own testimony he acknowledges that it "was a hot and heated night" at Falmouth City Council chambers. (R. 44 R. Taylor at TR 78, 89, Apx. pp. 214, 221)

[9] Plaintiff never asserted a claim for unlawful detention under the Fourth or Fourteenth Amendment in his Complaint. Plaintiff never named the alleged armed guards as Defendants; nor did he assert an unlawful detention claim against the councilmember who went outside.

solely of speech. Specifically, Petitioner relies upon a single verbal exchange between himself and Donald England. No physical confrontation between Donald England and Petitioner ever occurred; Councilmember Shields and a police officer who was present when Defendant England made his remark, each on their own initiative, went outside to make sure that no such confrontation ensued. Beyond this one verbal exchange that was initiated by Petitioner, he cannot point to anything else in support of his claims. The fact remains that Petitioner relies solely on speech to establish both a First Amendment retaliation claim and an equal protection violation. Under the legal authority he himself cites, such evidence was insufficient to overcome summary judgment. Having been unsuccessful in two attempts to convince the courts that he could sustain a claim, Petitioner now contends that the Sixth Circuit misconstrued the law and failed to apply applicable precedent. For the reasons explained herein, that contention cannot succeed.

In sum, the courts below were correct to grant summary judgment to the City and Council Defendants on Petitioner's claims. Though cleverly couched in terms of "conflicts" among the circuits and the failure to apply new precedent from this Court, all that the Petition really seeks is a review of the manner in which the Sixth Circuit applied existing applicable precedent. There is no conflict among the circuits, and the Sixth Circuit's application of the law to these facts is wholly consistent with the law as applied by its sister circuits.

II. THERE IS NO JUSTIFICATION FOR THE EXERCISE OF CERTIORARI ON PETITIONER'S FIRST AMENDMENT CLAIM

Petitioner's chief contention in support of certiorari is that *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006), has been insufficient to eliminate the so-called "division" among the circuit courts in applying the second element of First Amendment retaliation claims. (Petition, pp. 14-17) Petitioner's contention lacks merit and does not support a grant of certiorari.

A. THE HISTORY AND STANDARD ANNOUNCED BY THIS COURT IN *BURLINGTON NORTHERN*

This Court's decision in *Burlington Northern* resolved a split among the circuits as to whether Title VII's anti-retaliation provision should be interpreted coterminous with Title VII's anti-discrimination provision, such that the type of adverse employment action necessary to support a retaliation case was limited to the type of adverse employment action necessary to support a discrimination case.[10] Specifically, prior to *Burlington Northern*, some circuits applied an "ultimate employment decision" standard in which retaliation was not actionable unless it affected one of a narrow list of categories "such as hiring, granting leave, discharging, promoting, and

[10] Title VII's anti-discrimination provision appears at 42 U.S.C. § 2000e-2 and forbids discrimination against any members of certain protected groups "with respect to the terms and conditions of [their] employment." Title VII's anti-retaliation provision appears at 42 U.S.C. § 2000e-3 and forbids retaliation against an employee who has "opposed" a practice that is unlawful under Title VII's anti-discrimination provision.

compensating." Other circuits held that retaliation was actionable if it affected a "term or condition" of employment, "term or condition" being defined the same in both anti-discrimination and anti-retaliation cases. A few circuits held that the scope of actionable retaliatory conduct was broader than the scope of actionable discriminatory conduct. *See id.* at 2410-2411. Of course, the restrictive standards applied by some circuits left open many avenues for an employer to retaliate against an employee for having participated in Title VII enforcement proceedings without fear of liability.

In deciding *Burlington Northern*, this Court defined the scope of actionable retaliatory conduct in a Title VII context. The Court made clear that retaliatory conduct does not necessarily have to affect an ultimate employment decision or a term or condition of employment to be actionable, and that retaliatory conduct could, under the right circumstances, be actionable even if it occurred outside of the workplace. *See id.* at 2412-2414. In light of this Court's decision in *Burlington Northern*, an employee can recover under 42 U.S.C. § 2000e-3 for retaliation against her by her employer if the conduct would deter a reasonable employee from making or supporting a charge of discrimination. *Id.* at 2415. This is a broader standard than previously applied by many circuits in Title VII anti-retaliation cases.

Despite its breadth, the standard announced in *Burlington Northern* does not render *all* retaliatory conduct actionable in Title VII cases, a point that Petitioner neglects to acknowledge. This Court was quite clear on that point:

The anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm. . . . In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." . . .

We speak of *material* adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth a general civility code for the American workplace. . . . An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights that all employees experience. . . . The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. . . . It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC, the courts and their employers. And normally petty slights, minor annoyances and simple lack of good manners will not create such deterrence. . . .

We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters . . . Hence a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an "act that would be immaterial in some situations is material in others."

By focusing on the materiality of the challenged action and the perspective of a reasonable person

> in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

Id. at 2414-2416 (citations omitted). Thus, actionable retaliatory conduct in Title VII cases is now limited by one consideration and one consideration only: whether, under the circumstances, the retaliation was sufficient to deter a reasonable employee from asserting or supporting a charge of Title VII discrimination. This, of course, is precisely the standard the Sixth Circuit applied in the present case.

B. THERE IS NO "SPLIT" AMONG THE CIRCUITS WITH RESPECT TO WHETHER VERBAL CONDUCT ALONE CAN SATISFY THE "ADVERSE ACTION" ELEMENT OF FIRST AMENDMENT RETALIATION CLAIMS

The broad standard adopted by this Court in Title VII cases is essentially the same broad standard federal courts have applied, *even prior to Burlington Northern*, in First Amendment retaliation cases.

Specifically, federal courts universally hold that *any* conduct sufficient to deter a person of ordinary firmness from continuing to speak out on a matter of public concern satisfies the "adverse action" element of a First Amendment retaliation claim. Petitioner's intimation that the Second Circuit is the only circuit to apply this standard is simply inaccurate.[11] *Every* federal circuit to have confronted a

[11] See Petition, pp. 12-13.

First Amendment retaliation case has applied this flexible standard, both *before* and *since* this Court's June 22, 2006 decision in *Burlington Northern*. *See e.g., Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217 (2nd Cir. 2006); *Burkybile v. Bd. of Educ.*, 411 F.3d 306 (2nd Cir. 2005); *Thomas v. Independence Twnp.*, 463 F.3d 285 (3rd Cir. 2006); *O'Connor v. City of Newark*, 440 F.3d 125 (3rd Cir. 2006); *Blankenship v. Manchin*, 471 F.3d 523 (4th Cir. 2006); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005); *Crocker v. City of Kingsville*, 2006 U.S. Dist. LEXIS 51410 (S.D. Tex. July 26, 2006); *Izen v. Catalina*, 398 F.3d 363 (5th Cir. 2005); *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 2007 U.S. App. LEXIS 3689 (6th Cir. Feb. 20, 2007); *Mezibov v. Allen*, 411 F.3d 712 (6th Cir. 2005); *Massey v. Johnson*, 457 F.3d 711 (7th Cir. 2006); *Framsted v. Mun. Ambulance Serv.*, 347 F. Supp. 2d 638 (W.D. Wisc. 2004); *Osborne v. Grussing*, 2007 U.S. App. LEXIS 4134 (8th Cir. Feb. 26, 2007); *Revels v. Vincenz*, 382 F.3d 870 (8th Cir. 2004); *Giannini v. Calif. State Bar Assn.*, 2006 U.S. App. LEXIS 27975 (9th Cir. Nov. 8, 2006); *Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283 (9th Cir. 1999); *How v. City of Baxter Springs*, 2007 U.S. App. LEXIS 4083 (10th Cir. Feb. 22, 2007); *Mimics, Inc. v. Vill. of Angel Fire*, 394 F.3d 836 (10th Cir. 2005); *Pittman v. Tucker*, 2007 U.S. App. LEXIS 381 (11th Cir. Jan. 9, 2007); *Bennett v. Hendrix*, 423 F.3d 1247 (11th Cir. 2005); *Trudeau v. FTC*, 372 U.S. App. D.C. 335 (2006).

Of course, and consistent with *Burlington Northern*, some conduct undertaken to retaliate against a person for his First Amendment expression will not be actionable under this standard. Just as Title VII retaliation cannot be premised on "trivial harms," *Burlington Northern*, *supra*,

First Amendment retaliation "is not born of de minimis threats or inconsequential actions." *Ctr. For Bio-Ethical Reform*, *supra*, citing *Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999); *see also Dawes v. Walker*, 239 F.3d 489 (2nd Cir. 2001); *McKee v. Hart*, 436 F.3d 165 (3rd Cir. 2006); *Balt. Sun Co. v. Ehrlich*, 437 F.3d 410 (4th Cir. 2006); *Morris v. Powell*, 449 F.3d 682 (5th Cir. 2006); *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982); *Garcia v. City of Trenton*, 348 F.3d 726 (8th Cir. 2003); *Brown v. Runnels*, 2006 U.S. Dist. LEXIS 28658 (E.D. Cal. May 11, 2006); *How*, *supra*; *Bennett*, *supra*. The "person of ordinary firmness" standard "is an objective inquiry which is flexible enough to accommodate the various circumstances in which retaliation claims arise and which is capable of screening the most trivial of actions." *Mitchell v. Chandler*, 2006 U.S. Dist. LEXIS 71843 (W.D. Ky. Sept. 26, 2006), citing *Thaddeus-X*, *supra*. *See also Blankenship*, *supra*; *Bennett*, *supra*; *Zelnik*, *supra*.

Many specific instances of purely verbal[12] retaliatory conduct fail to support a First Amendment retaliation claim because they are simply insufficient to deter a person of ordinary firmness from continuing to engage in

[12] Petitioner contends there is a split among the circuits as to "the proper standard for determining whether retaliatory verbal conduct toward an ordinary citizen is actionable" in First Amendment retaliation cases. To effectively evaluate whether such a split in fact exists, one must necessarily isolate First Amendment retaliation cases involving purely "verbal" retaliation. Identifying such cases is an issue unto itself which begs the question: "Verbal," as opposed to what? It is not entirely clear whether retaliation continues to be "verbal" when it extends beyond simple name-calling to, for example, an unexecuted threat, verbal release of private information about a plaintiff to a third person, an accusation, or having a conversation about the plaintiff with a third party.

protected conduct. *E.g., Naucke v. City of Park Hills*, 284 F.3d 923 (8th Cir. 2002) (harassing comments were offensive, unprofessional and inappropriate but were insufficient to deter a person of ordinary firmness from expressing political views); *McKee*, *supra* (remarks insufficient to deter person of ordinary firmness from continuing to express views about the appropriate scope of an investigation); *Dawes*, *supra* (being called a "rat" and "informant" in retaliation for filing a grievance would not deter inmate of ordinary firmness from making further grievances); *Nunez v. City of Los Angeles*, 147 F.3d 867 (9th Cir. 1998) (being "badmouthed" and threatened insufficient under the circumstances to deter person of ordinary firmness from engaging in protected conduct); *Richardson v. Sherrer*, 2007 U.S. Dist. LEXIS 4994 (D.N.J. Jan. 23, 2007) (idle threats of harassment are not actionable retaliation).

Purely "verbal" retaliation is particularly susceptible to falling short of the "person of ordinary firmness" standard because it presents a competition of First Amendment rights. Specifically, both parties to retaliation cases have rights under the First Amendment, and imposing liability for simple speech would infringe on the rights of the public official whose speech is at issue. *Suarez Corp. Ind. v. McGraw*, 202 F.3d 676 (4th Cir. 2002); *Nunez v. City of Los Angeles*, 147 F.3d 867 (9th Cir. 1998); *Chicago Reader v. Sheahan*, 141 F. Supp. 2d 1142 (N.D. Ill. 2001); *XMen Sec. Inc. v. Pataki*, 196 F.3d 56 (2nd Cir. 1999); *Mezibov*, *supra*.

However, no circuit rigidly holds that verbal retaliation is *per se* insufficient to support a First Amendment retaliation claim. Indeed, under appropriate circumstances, verbal retaliation *may* be sufficient to deter a

person of ordinary firmness from engaging in protected conduct. For example, when verbal retaliation is part of a campaign of harassment, it is generally actionable. In *Barth*, *supra*, a city employee opposed the incumbent mayor in an election. She alleged that the mayor orchestrated a campaign of petty harassments – including baseless reprimands and ridiculing her for bringing a birthday cake to the office – in retaliation for her political ambitions. The Seventh Circuit denied summary judgment to the mayor, explaining:

> . . . we cannot say as a matter of law that the exercise of First Amendment rights by public employees cannot be deterred by subjecting employees who exercise them to harassment and ridicule through selective enforcement of work rules. The effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable. Yet even in the field of constitutional torts de minimis non curat lex. Section 1983 is a tort statute. A tort to be actionable requires injury. It would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise – that if the Mayor of Springfield had frowned at Miss Bart for running for public office he would be liable for damages (unprovable, of course) under section 1983. However, more is alleged here – an entire campaign of harassment which though trivial in detail may have been substantial in gross. It is a question of fact whether the campaign reached the threshold of actionability under section 1983.

Id. See also Phillips v. Bowen, 278 F.3d 103 (2d Cir. 2002); *Thomas, supra*; *McBride v. Village of Michiana*, 100 F.3d 457 (6th Cir. 1996) (pervasive verbal harassment and threats sufficient to deter First Amendment activity); *Allen v. Scribner*, 812 F.2d 426 (9th Cir. 1987); *Pittman, supra*.

The authorities contained in the Petition do not support the existence of a *per se* rule in any jurisdiction. Of the authorities Petitioner cites as providing the position of the Fifth and Ninth Circuits, only two – *Gilbrook v. City of Westminster*, 177 F.3d 839 (9th Cir. 1999), and *Nunez, supra* – are actually First Amendment retaliation cases.[13] In *Gilbrook*, the alleged retaliation was lost job and lost pay – not merely verbal conduct. *Nunez* applies the "person of ordinary firmness" test and concludes that, *under the circumstances of that case*, the verbal conduct alleged was insufficient. Similarly, the authority Petitioner cites as the Fourth Circuit's position – *Suarez, supra* – does not represent a *per se* rule. The *Suarez* Court recognized that verbal conduct by public official could be actionable if it contained a threat, coercion, or intimidation, or if it was sufficiently embarrassing because of the disclosure of private information, or if it affects another more tangible interest. This is simply another way of saying that verbal conduct may be sufficient to deter a person of ordinary firmness, depending on the context and circumstances. Thus, *Suarez* is entirely consistent with other jurisdictions in applying the "person of ordinary firmness" standard.

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[13] Petitioner also cites *Bender v. Brumley*, 1 F.3d 271 (5th Cir. 1993), and *Coyle v. Hughs*, 436 F. Supp. 591 (W.D. Ok. 1977). (Petition, p. 12) Neither involves the First Amendment or retaliation in any context.

There is no split among the circuits with regard to the sufficiency of verbal conduct to establish a First Amendment retaliation claim. The different results reached by the federal courts – sometimes two federal courts in the same circuit – in cases involving verbal retaliation simply reflects the fact-specific nature of the applicable standard and is proof that the standard is working as it should.

In the present case, the Sixth Circuit and the district court both clearly understood and correctly applied the "person of ordinary firmness" standard. Both reviewed the evidence extensively and concluded that a person of ordinary firmness would not have been deterred from addressing the Falmouth City Council simply because Donald England, on one occasion, called him a black bastard and threatened to engage him in a fist fight. That conclusion is appropriate inasmuch as retaliation cases are not intended to enforce a general civility code, but only to prevent conduct that would deter a person of ordinary firmness from engaging in protected conduct. *Burlington Northern*, *supra*. What Petitioner essentially seeks from this Court is a third application of the established standard – but with a different outcome. Clearly, that is not the purpose of certiorari. Supreme Ct. R. 10.

III. THE "HARASSMENT OR OTHER CONDUCT" REQUIREMENT IN EQUAL PROTECTION CASES PREMISED ON A RACIAL SLUR IS CONSISTENT WITH *ARLINGTON HEIGHTS*

To prevail on a claim under the Equal Protection Clause, a plaintiff must establish both discriminatory effect *and* discriminatory purpose. *Village of Arlington Hts. v. Met. Hous. Dev. Corp.*, 429 U.S. 252 (1977) ("Official action will not be held unconstitutional solely because

it results in a racially disproportionate impact.... A racially discriminatory intent ... must [also] be shown."); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003).

Discriminatory purpose may be established by reference to statements attributable to the person or entity accused of violating the plaintiff's rights. E.g., *Arlington Hts., supra* at 268; *Sylvia Dev. Corp. v. Calvery Corp.*, 48 F.3d 810 (4th Cir. 1995); *Elston v. Talladega Co. Bd. Of Educ.*, 997 F.2d 1394 (11th Cir. 1993); *McKee v. Rockwall*, 877 F.2d 409 (5th Cir. 1989); *Carrasca v. Pomeroy*, 313 F.3d 828 (3rd Cir. 2002). Discriminatory purpose, however, is only half of the equation in Equal Protection analysis. A plaintiff is still required to demonstrate a discriminatory effect.

For that reason, federal courts faced with the utterance of racially charged statements by public officers have refused to impose liability unless the plaintiff can show that the officer in question treated him differently in some other respect. Generally, harassment or some other conduct on the part of the officer that violates the plaintiff's rights is sufficient to establish discriminatory effect. Such was the Fifth Circuit's reasoning in *Williams v. Bramer*, 180 F.3d 699, 706 (5th Cir. 1999):

> We hold today that an officer's use of a racial epithet, without harassment or some other conduct that deprives the victim of established rights, does not amount to an equal protection violation. When leveled against a citizen by a police officer, a racial epithet, by its nature, calls attention to the citizen's racial identity. The use of an epithet is therefore strong evidence that a comment or action is racially motivated. The question in the

> equal protection context, however, is not just whether the conduct is racially motivated but also whether that action deprives a person of "equal protection of the laws." . . . Where the conduct at issue consists solely of speech, there is no equal protection violation.

See also Salley v. PA Dept. of Corr., 181 Fed. Appx. 258 (3rd Cir. 2006) (no equal protection violation, despite alleged use of slur, in the absence of evidence that plaintiff was treated differently); *Keyes v. Albany*, 594 F. Supp. 1147 (N.D.N.Y. 1984) ("An equal protection violation will be found when racial animus inspires police misconduct"); *Anderson v. Kierstead*, 2006 U.S. Dist. LEXIS (D.N.J. Feb. 6, 2006); *DeWalt v. Carter*, 224 F.3d 607 (7th Cir. 1999); *Buckley v. Gomez*, 1999 U.S. App. LEXIS 129 (9th Cir. Jan. 4, 1999).

Requiring an Equal Protection plaintiff to show harassment or some other conduct that violates his rights is not, as Petitioner claims, a "heightened evidentiary harassment threshold." Rather, that requirement simply reflects the fact that an Equal Protection claim is comprised of two elements, i.e., discriminatory purpose *and* discriminatory effect. By imploring this Court to premise Equal Protection liability on a single racially charged statement, Petitioner essentially seeks to eliminate the discriminatory effect component of such a claim. Clearly, Petitioner's position is contrary to the well-established precedent of this Court. *Arlington Hts., supra*; *Cuyahoga Falls, supra*.

Nor is there any wisdom to further defining the type of "harassment" sufficient to constitute discriminatory effect, as Petitioner suggests. (Petition, pp. 27-29) The number and variety of scenarios that could comprise

harassment are not subject to reasonable prediction and therefore cannot be easily articulated as a test. Thus, any attempt to define a set of circumstances that constitute harassment will likely exclude worthy claims. The better approach, in cases where any evidence of harassment exists, is to allow a jury to determine the issue of harassment, where any evidence of such harassment exists. Federal courts already take that approach. E.g., *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004); *Abuhouran v. Acker*, 2005 U.S. Dist. LEXIS 12864 (E.D. Pa. June 29, 2005); *Martin v. City of San Antonio*, 2006 U.S. Dist. LEXIS 54392 (W.D. Tex. July 25, 2006); *Cannon v. Burkybile*, 2000 U.S. Dist. LEXIS 14139 (N.D. Ill. Sept. 25, 2000). The present case simply was not one in which any evidence of harassment existed, no matter how many different ways Petitioner tries to manipulate the facts.

IV. PETITIONER HAS PRESENTED NO JUSTIFICATION FOR THE GRANT OF CERTIORARI AS AGAINST THE CITY OF FALMOUTH

Although Petitioner identifies the City of Falmouth in the "Parties to the Proceeding" section of the Petition, he has presented no argument that the Sixth Circuit erred in granting summary judgment to the City. As such, there is no justification for the grant of certiorari as against the City of Falmouth.

CONCLUSION

In light of the foregoing, there is no compelling reason to grant the Petition for Writ of Certiorari. The Sixth Circuit's decision in this matter does not conflict with *Burlington*

Northern, *supra*, or with any other decision of this Court, nor does the Sixth Circuit's decision conflict with any decision of any other circuit court on any important question of federal law. To the contrary, the Sixth Circuit relied on well-established principles of law and applied those principles to the facts of this case, which it construed in a light most favorable to Petitioner. Stripped of its claims of conflict among the circuits, the Petition's real contention is that the Sixth Circuit misapplied legal principles, resulting in an incorrect decision. Of course, Petitioner's assessment in this regard is wholly inaccurate. However, even if Petitioner's assessment were accurate, Supreme Court Rule 10 provides that the misapplication of established legal principles is not a compelling reason to grant a petition for writ of certiorari. Therefore, Respondents, England and the City of Falmouth respectfully request that the Court deny the Petition for Writ of Certiorari in this case.

Respectfully submitted,

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Nº. 06-1036

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In The Supreme Court of the United States

RALPH TAYLOR,
Petitioner,
v.
CITY OF FALMOUTH AND DONALD ENGLAND,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. What is the proper standard for determining whether retaliatory verbal conduct toward an ordinary citizen engaged in First Amendment activity is actionable under §1983, is it either: (1) not actionable under any circumstances as a matter of law simply because it is verbal in nature (as held by the Sixth, Fifth and Ninth Circuits); (2) actionable only if it includes a threat, coercion or intimidation (as held by the Fourth Circuit); or (3) actionable where it would deter a reasonable person from engaging in protected activity (as held by the Second Circuit and as recently set forth by this Court in the employment context in Burlington)?

2. What is the proper evidentiary threshold for an ordinary citizen to establish a violation of the Equal Protection Clause where a government official subjects him to a racial slurs and harassment, is it either; (1) proof that the conduct had a discriminatory effect and a discriminatory purpose (as this Court held in *Arlington Heights*); or (2) proof of a racial slur plus harassment and/or a distinct violation of rights (as held by the Sixth, Third, Fifth and D.C. Circuits); and if the second standard applies, what is the standard for defining "harassment"?

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STATEMENT OF THE CASE

It is an undisputed matter of record that Petitioner Ralph Taylor, while speaking under official recognition during a city council meeting, was interrupted, was called a "big black bastard" and threatened with violence by Respondent Donald England, a city council member, simply because Mr. Taylor raised an issue that the city council did not want to address.[1]

Respondents' contention that there is no evidence in the record that the city council "*as a whole*" engaged in the retaliatory and racially hostile conduct at issue is simply incorrect. (Respondents' Brief at 9). The record is clear that England's racist and retaliatory comments were made during an official council meeting after Mr. Taylor had been officially recognized to address the council. Mr. Taylor testified that in the wake of England's statements, he heard laughter from other members of council. (R. Taylor Depo. Apx. 231). Every member of the city council admitted that they heard England's racial outburst, but not a single one of them did and said anything to counteract it. (England Depo. Apx. 246-247; Fields Depo. Apx. 250; Faugher Depo. Apx.

[1] Respondents' suggestion that Mr. Taylor's grievance, which related to the City's unlawful impoundment of his son's vehicle, was appropriately handled by the City on that evening was squarely rejected by the district court. Indeed, neither Mr. Taylor nor his son Shawn obtained *any* meaningful relief for the grievance until the district court entered summary judgment in *favor* of Shawn Taylor finding that the City's confiscation and retention of the vehicle violated his rights to due process of law. (Apx. D-68).

252-253; Sheilds Depo. Apx. 256; Cross Depo. Apx. 266). England's statements, coupled with every other member's admitted acquiescence, would permit a reasonable fact finder to infer that the entire council tacitly approved of and/or condoned England's statements and threats sufficient to establish the culpability of the legislative body. *Christie v. Iopa*, 176 F.3d 1231, 1240 (9th Cir. 1999); *Bartholomew v. Fischl*, 782 F.3d 1148, 1154 (3d Cir. 1986)("a 'single instance' of misconduct by a policy-making city official could provide the basis for an inference that a municipal policy existed.")

SUMMARY OF THE REPLY ARGUMENT

According to Respondents, it is "clearly understood" that a reasonable African American of ordinary firmness would not be deterred from speaking in front of an all-white city council at a public meeting "simply because [England], on one occasion, called [Mr. Taylor] a 'black bastard' and threatened to engage him in a fist fight." (Respondents' Brief at 21). In other words, a reasonable African American should expect to endure racial slurs and threats of violence from government officials if he wishes to exercise his First Amendment right to approach the podium during an open government meeting. Although this statement may seem absurd on its face, it is, at present, the state of the law in several circuits across the country, including the Sixth Circuit.

Respondents sidestep the central issues raised in Mr. Taylor's petition, failing to squarely address any the three arguments presented therein: (1) that a conflict exists among the circuits as to whether and when verbal conduct constitutes actionable retaliation § 1983; (2) that under *Burlington*, employees are given greater protection against retaliation for engaging in statutorily-protected activity than ordinary citizens are given for engaging in First Amendment activity; and (3) that the heightened "harassment" requirement for an equal protection claim imposed by circuit courts does not comport with the standards set by this Court in *Grutter* and *Arlington Heights* and lacks any consistent definition among the circuits.

In the absence of this Court's intervention, African Americans like Mr. Taylor who simply wish to speak out at a public meeting face a daunting choice: either put up with racial slurs and threats of violence from government officials or remain silent. Surely this cannot be the law of the United States. Unless this Court smoothes this legal landscape, however, it will be.

ARGUMENT

I. RESPONDENTS' OWN AUTHORITIES ILLUSTRATE THE THREE-WAY CONFLICT AMONG THE CIRCUIT COURTS ON WHETHER AND WHEN VERBAL CONDUCT CONSTITUTES ACTIONABLE RETALIATION.

Respondents attempt to characterize all circuits as in agreement on the standard for determining what constitutes actionable retaliation under the First Amendment is, at best, misleading. The "person of ordinary firmness" standard can hardly be considered a consistent guideline among the circuits where some, like the Sixth Circuit, categorically refuse to consider retaliatory verbal conduct – regardless of its content – as actionable. Indeed, Respondents incorrectly represent to this Court that the Sixth Circuit applied the "person of ordinary firmness" standard to the facts of this case. It did not. (*See* Respondents' Brief at 21). The Sixth Circuit circumvented that question by posing another question, specifically whether "*verbal abuse* is sufficient (or insufficient) evidence of adverse action." (Apx. C-11)(emphasis in original). Relying on *Bender v. Brumley*, 1 F.3d 271 (5th Cir. 1993) and *Doe v. Gooden*, 214 F.3d 952 (8th Cir. 2000), the Sixth Circuit determined that a claim for retaliation based on verbal conduct cannot support a § 1983 claim as a matter of law. (Apx. C-13).

Respondents' own authorities underscore the three differing views expressed by the circuit courts as to whether and when verbal conduct can constitute actionable retaliation under § 1983: (1) no/never (Sixth, Fifth and Eighth Circuits); (2) yes/if the verbal conduct contained a coercion or threat (Fourth Circuit); and (3) yes/if the verbal conduct would deter a reasonable person from engaging in First Amendment activity (Second Circuit applying this Court's decision in *Burlington* to § 1983 retaliation). In practical terms, this inconsistency means that had Mr. Taylor brought his same claims in a different judicial circuit, such as the Second or Fourth Circuits, his retaliation claim would not have been summarily rejected simply because the admitted retaliatory conduct he was forced to endure was verbal in nature. Contrary to Respondents' argument, resolving this type of disparity between the circuits on an issue of Constitutional significance is precisely the purpose of certiorari.

II. *BURLINGTON* REQUIRES COURTS TO CONSIDER THE CONTEXT AND DETERRENT EFFECT OF ALL RETALIATORY CONDUCT.

Respondent concedes that the scope of protection against retaliation in a § 1983 context should, at a minimum, be equal to the scope of the protection against retaliation in an employment context conferred by *Burlington*. What Respondent fails to address, however, is that while *Burlington*

does not render every retaliatory act actionable, it does require that courts consider every act in the specific context in which it was undertaken to determine whether the act "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington*, 126 S.Ct. at 2415 (internal citations omitted). Under *Burlington*, the form of the retaliatory conduct does not matter; all retaliatory acts must be judged on their substance. *Id.* Where circuit courts like the Sixth Circuit (as well as the Fourth, Fifth and Eighth Circuits) base their decisions on the form of the conduct, i.e., verbal, with no consideration of context or substance to determine whether the verbal conduct with have deterred a reasonable person from engaging in First Amendment activity, these circuits are applying a standard of protection less than that set forth in *Burlington*. *Id.*

The discrepancy between retaliation protections conferred by *Burlington* in the employment context and the undefined scope of protection in the First Amendment context is best illustrated by applying the egregious facts of this case to the employment context. Had Petitioner's been couched in an employment context and subject to *Burlington*, that is, had Petitioner filed an EEOC charge of discrimination and Donald England, acting as his employer, had responded to his protected activity by calling him a "big black bastard" and threatening to inflict physical harm upon him as result,

Petitioner would have an actionable claim for employment retaliation under Title VII. *See i.e., Thomas v. iStar Financial, Inc.*, 438 F.Supp.2d 348, 366 (holding that threats can be a materially adverse action under Title VII); *Walsh v. Irvin Stern's Costumes*, unreported, 2006 WL 2380379 at *2 (E.D.Pa 2006)(employer's threat to accuse plaintiff's of criminal offense if she did not withdraw EEOC charge actionable retaliation); *Wyatt v. Ford Motor Co.*, unreported, 2006 WL 2009230 at *5 (actionable retaliation where verbal intimidation escalated after protected activity). Yet in a First Amendment context, the Sixth Circuit summarily deemed those same facts not actionable by the Sixth Circuit simply because they were verbal in form. The result is that Petitioner received less protection from retaliation for engaging in First Amendment activity then he would if he were an employee engaged in Title VII activity.

III. THE HEIGHTENED AND UNDEFINED "HARASSMENT" REQUIREMENT IMPOSED BY SOME CIRCUIT COURTS CONFLICTS WITH THIS COURT'S REQUIREMENTS FOR AN EQUAL PROTECTION CLAIM.

This Court has never required an evidentiary burden of showing "harassment" in addition to evidence of racially discriminatory treatment in order to make out an equal protection claim. Respondent fails to address this Court's articulation of an equal protection claim in *Grutter v.*

Bollinger, 539 U.S. 306 (2003). In *Grutter*, this Court ruled that "whenever the government treats any person unequally because of his or her race, **that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection**."(emphasis added) (internal quotes and citation omitted). In spite of this Court's clear standard for an equal protection claim, the Sixth Circuit (joining the Third, Fifth and D.C. Circuits) has imposed a different and indeed heightened standard, requiring an additional showing of "harassment."

Equally as troubling as these circuits' arbitrarily heightened "harassment" requirement is the lack of any definition of what constitutes "harassment" sufficient to support an equal protection claim. Here, Petitioner set forth facts to establish that the racial tirade to which he was subjected was coupled with *both* a threat of violence *and* a 30-45 minute police detention. Nevertheless, the Sixth Circuit concluded, without any meaningful analysis, that the present case was "not one in which any evidence of harassment existed." (Respondents' Brief at 24). Simply stated, if the facts of this case are insufficient to support the "discriminatory effect" component of an equal protection

claim under these circuits' heightened standard, then it is left to this Court to articulate the applicable standard.[2]

The humiliation that necessarily attends the racial berating that Petitioner suffered as he lawfully addressed his local government is no different in discriminatory effect than the injury suffered by black students in schools that were segregated under the old "separate but equal" doctrine. "Our pointed focus in *Brown I* upon the **stigmatic injury** caused by segregated schools explains our unflagging insistence that formerly *de jure* segregated school districts extinguish all vestiges of school segregation." (emphasis added). *Board of Educ. of Oklahoma City Public Schools, v. Dowell* 498 U.S. 237, 257 (1991). The "stigmatic injury" is no less apparent here where Petitioner has been subjected to a racially hostile philippic in response to his lawful attempt to seek redress from his city council.

CONCLUSION

If the Sixth Circuit's interpretation of First Amendment retaliation protections and the Equal Protection Clause is correct, as Respondent suggests, then every African American who wishes to petition his local government can

[2] Respondent's argument that what constitutes "harassment" should be determined by a jury rings hollow in light of the fact that Petitioner was *denied* the opportunity to present his claims to a jury.

expect to endure retaliatory and racist indignities and even threats of violence for which he will have no constitutional recourse. Absent this Court's review, African Americans – and indeed every person less favored among the majority – will be faced with the untenable choice of exercising his First Amendment right under these circumstances or simply remain silent. This case cries out for the Court's intervention.

For the foregoing reasons and those set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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